(27,342)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 587.

WILLIAM BREIHOLZ, EDWARD KORF, JOSEPH STUART, ET AL., PLAINTIFFS IN ERROR,

vs.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 16, 1920.

1 In the Supreme Court of Iowa, May Term, A. D. 1918.

In Equity. Causes No. 4130 and 4152.

WILLIAM BREIHOLZ, EDWARD KORF, JOSEPH STUART, MARY DOYLE, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitsman, J. M. De Vaul, Appellants,

vs.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA, W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klien, Members of the Board of Supervisors of Pocahontas County, Iowa; L. O'Donnell, as Auditor of Pocahontas County; John Forbes, County Treasurer of Pocahontas County, Iowa; S. F. Hiatt, and the Katz-Craig Contracting Company, Drainage District No. 29, Pocahontas County, Iowa, Appellees.

Appeal from the District Court of Pocahontas County, Iowa.

Hon. D. F. Coyle, Judge.

T. F. Lynch, of Pocahontas, Iowa, and Kenyon, Kelleher, Price & Hanson, of Fort Dodge, Iowa, Attorneys for Appellants.
F. C. Gilchrist, of Laurens, Iowa, and Robert Healy, of Fort Dodge, Iowa, Attorneys for Appellees.

Appellants' Abstract of the Record.

2 Due, legal and timely service of the within abstract of the Record is hereby accepted and we acknowledge the receipt of two copies thereof and we also acknowledge service of notice of oral argument.
Dated at Pocahontas, Iowa, this — day of April, 1918.

——— ———,

———,

Attorneys for Appellees.

3 *Pleadings.*

On the second day of October, 1913, the Plaintiffs, William Breiholz, et al., filed their petition in the office of the Clerk of the District Court of Pocahontas County, Iowa, against the Defendants Board of Supervisors of Pocahontas County, Iowa, and on the first day of December, 1913, the said Plaintiffs filed another petition against the said Defendants; both petitions being similar in form and the petition filed on the first of December, 1913, is as follows:

Petition.

The Plaintiffs for cause of action against the Defendants, state:

Par. 1. That the Plaintiffs are each the owners of certain described lands in Pocahontas County, Iowa, included in what is known as Drainage District No. 29, in said county.

Par. 2. That they have a common though not an equal interest in the relief hereinafter prayed for and in their behalf.

Par. 3. That the Defendants W. P. Hopkins, W. C. Lieb, C. Nolan, M. J. Dooley, and R. Klien are members of the Board of Supervisors of Pocahontas County, Iowa.

Par. 4. That the Defendant L. O'Donnell is the County Auditor of Pocahontas County, Iowa.

Par. 5. That the Defendant John Forbes is the County Treasurer of Pocahontas County, Iowa.

Par. 6. That the Defendant S. F. Hiatt is a drainage contractor of Pocahontas County, Iowa.

Par. 7. That the Defendant the Katz-Craig Contracting
4 or Construction Company is a contracting company of Omaha, Nebraska, and is engaged in the construction of drainage ditches in Pocahontas County, Iowa, and in other counties in the State of Iowa.

Par. 8. That on or about the 24th of October, 1907, there was established and organized, by the Board of Supervisors in Pocahontas County, Iowa, a drainage district known and numbered as Drainage District No. 29, Pocahontas County, Iowa.

Par. 9. That the improvements contemplated in the organization of said Drainage District No. 29, and the improvements that were afterwards ordered and constructed in said district, consisted of open drains and ditches known in part as Main Ditch, "Branch A" and also tile drains one of which known of in part as "Branch B" affected in some measure the lands of these plaintiffs.

Par. 10. That on or about the 8th day of April, 1908, the Board of Supervisors of Pocahontas County, Iowa, made and entered into a certain contract with the defendants, the Katz-Craig Contracting Company, for the construction of certain of the improvements in said drainage district for the consideration of $31,525.00.

Par. 11. That on or about the 31st day of January, 1910, the said Katz-Craig Contracting Company by a written proposal, filed with the Board of Supervisors of Pocahontas County, offered to the said Board to modify and change the terms of their contract previously made with the board as above stated, and to complete only a part of said ditch for an agreed compensation of $4,425.00 and to cancel the remainder of their contract with the Board of Supervisors,

said $4,425.00 when paid to the said Katz-Craig Company to
5 be payment in full of all claims which the said Katz-Craig Company would have, demand or be entitled to under their contract with the said Board of Supervisors, for all work done in constructing drainage district No. 29.

Par. 12. That on or about the 11th day of February, 1910, the said Board of Supervisors by resolution duly made and entered of record, accepted the proposition of the Katz-Craig Company and thereby and on account of which when the said company completed their contract then under the new agreement they would be entitled in full payment for all the work that they did under their contract in district No. 29, a total sum of $4425.00.

Par. 13. That the engineer in charge of the construction of the improvement in said drainage district issued monthly estimates to the Katz-Craig Constructing Company for $4415.00 and no more, which was in full payment of all work of any kind or description that said contracting company had done or performed under their contract in drainage district No. 29.

Par. 14. That upon said estimates the County Auditor of Pocahontas County, Iowa, issued to the said Katz-Craig Constructing Company warrants against the drainage funds in drainage district No. 29 upon the county Treasurer of said County for the sum of $3,532.01 prior to the 7th day of July, 1910.

Par. 15. That on the 7th day of July, 1910, the Board of Supervisors of Pocahontas County, Iowa, made and entered a resolution directing J. A. Terry the then County Auditor of Pocahontas County, Iowa, to issue to the Katz-Craig Constructing Company a warrant against the drainage funds in said drainage district No. 29,
6 in the sum of $2675.83 and that on or about the 30th day of July, 1910, the said County Auditor issued to the Katz-Craig Constructing Company a warrant upon the County Treasurer of said County and against the funds in said drainage district for the sum of $2675.83.

Par. 16. That said warrant thus issued being warrant No. — constituted an overpayment to the Katz-Craig Constructing Company of the sum of approximately $1782.84 more than was due the said Katz-Craig Constructing Company under its said contract in said drainage district. That the engineer in charge of the construction of said improvement never filed with the county Auditor of Pocahontas County, Iowa, an estimate of said payment.

Par. 17. That said resolution of the Board of Supervisors so entered on the 7th day of July, 1910, and the said warrant for $2675.83 so issued to the Katz-Craig Constructing Company on July 30th, 1910, was made, entered, done, and issued through inadvertence, mistake, and oversight upon the part of the Board of Supervisors and the County Auditor of Pocahontas County, Iowa, and the funds of said district in which these Plaintiffs are interested have been depleted and diminished in said amount.

Par. 18. That the said Katz-Craig Constructing Company has received from the County Treasurer of Pocahontas County, out of the funds of said Drainage District No. 29 the full amounts of all warrants issued to it, amounting to the sum of $6207.84 and interest thereon and including the overpayment of $1782.84 and interest thereon.

Par. 19. Plaintiffs further allege and state the fact to be that the resolution adopted by the said Board of Supervisors on the
7 7th day of July, 1910, was erroneous and illegal; that the sum of $2,675.83 found by this resolution to be due said contractors in mistake and error and in truth and in fact there was only the sum of $883.02 due the said contractors at said time and that said mistake these Plaintiffs allege had wronged them as well as others in the district and has reduced and depleted and lessened the drainage fund of said district in the amount of $1,782.84 with interest at 6% from July 30, 1910.

Par. 20. That or about the — day of ——, in the year of ——, the Board of Supervisors of Pocahontas County by a resolution entered of record confirmed and levied an assessment against all the lands in drainage district No. 29 to pay for the construction of the ditches and drains in said district and that the lands of these appellants were assessed the amount hereinafter set out on said assessment.

Par. 21. That on or about the 8th day of June, 1911, the Board of Supervisors of Pocahontas County by a resolution entered of record ordered and authorized certain repairs and changes of the ditches constructed in said drainage district No. 29.

Par. 22. That under the guise of said resolution the Board of Supervisors on or about the 9th day of June, 1911, entered into a written contract with the defendant S. F. Hiatt whereby the said S. F. Hiatt agreed to deepen, clean, reopen and repair certain parts of said Drainage District No. 29 and the said Board of Supervisors agreed to pay to the said S. F. Hiatt a large sum of money, to wit, approximately about $11,000.00.

Par. 23. Plaintiffs further allege and state the fact to be on information and belief, that neither these plaintiffs nor any of the other landowners interested in the improvement in said Drainage
8 District No. 29, were ever notified or had any knowledge of said action of the Board of Supervisors in entering said resolution and making said contract with the said S. F. Hiatt. Nor were these Plaintiffs or any of the other persons interested in said Drainage Improvement ever given an opportunity to be heard before the Board of Supervisors upon the matter involved in the said resolution and the said contract with S. F. Hiatt.

Par. 24. That no notice was ever given inviting contractors to bid on the improvement to be made or work to be done under the said resolution made and entered on the 8th day of June, 1911, and the said contract was not let to the lowest responsible bidder as required by law but was in truth and in fact awarded to and entered

into with the said S. F. Hiatt without any notice, without any opportunity for the said landowners interested to be heard, without any notice to them of any proposed cleanouts, repairs, or changing of the improvements, ditches, and drains in Drainage Improvement District No. 29 and without the parties interested and that would be required to pay for the same, being given an opportunity to be heard on the necessity and advisability of any changes to be made, and that said contract thus made and entered into with the Defendant S. F. Hiatt was for an exorbitant and unreasonable amount and rate of compensation and is therefore illegal and void as is also all the acts and doings of said Board of Supervisors in regard to said matter.

Par. 25. That under the authority of said resolution of June 8th, 1911, and the said contract of June 9th, 1911, with S. F. Hiatt, certain of the ditches and drains in said Drainage District were greatly enlarged and changed by deepening and widening and enlarging the same beyond the original plans and specifica-
9 tions and that these Plaintiffs had no notice or knowledge thereof until after the construction of the same.

Par. 26. Plaintiffs further allege and state the fact to be that they are informed and believe that the following warrants have been issued by the County Auditor of Pocahontas County, Iowa, to the said Defendant S. F. Hiatt in payment of said work under said illegal contract of June 8th, 1911.

Warrant No. 3038, August 23, 1911	$1,632.24
" No. 3261, Dec. 6, 1911	2,464.00
" No. 3740, June 20, 1912	4,334.18
" No. 3741, June 20, 1912	2,167.60

That said warrants were illegally issued by said County Auditor and were without authority of law to pay for said work done under said illegal contract; and that Plaintiffs are informed and believe that said warrants have been wrongfully presented to the Defendant John Forbes, County Treasurer of Pocahontas County, for payment and some have been paid and others will be unless the defendants are restrained and enjoined from so doing.

Par. 27. Plaintiffs allege and state the fact to be that on or about the 8th day of Nov., 1911, the Board of Supervisors by a resolution entered of record made an apportionment of the costs of construction, fees and damages, for the construction of the improvements in said drainage district and levied the same against the lands in said district including the plaintiff's lands against which an assessment was levied as follows:

10 William Breiholz.

NW¼ of SW¼ 21-90-33	$103.74
SW¼ of SW¼ 21-90-33	49.14
NE¼ of SE¼ 20-90-33	958.23
NW¼ of SW¼ 20-90-33	327.60
N 10 acres SW¼ of SE¼ 20-90-33	81.90
N 10 acres SE¼ of SE¼ 20-90-33	382.20

Edward Korf.

SW¼ of NW¼ 20-90-33	$363.48
SE¼ of NW¼ 20-90-33	775.20

Mary Doyle.

SW¼ of NW¼ 20-90-33	$200.22
SE¼ of SW¼ 20-90-33	432.25

J. W. Clancey.

SW¼ of SW¼ 16-90-33	$829.92
SE¼ of SW¼ 16-90-33	1,490.58
NE¼ of NW¼ 21-90-33	556.92
NW¼ of NW¼ 21-90-33	311.22
SW¼ of NW¼ 21-90-33	185.64
SE¼ of NW¼ 21-90-33	81.90

Charles F. Linnan.

NE¼ of NE¼ 17-90-33	$262.82
NW¼ of NE¼ 17-90-33	827.63
SW¼ of NE¼ 17-90-33	170.40
SE¼ of NE¼ 17-90-33	166.14
NE¼ of SE¼ 17-90-33	166.14
NW¼ of SE¼ 17-90-33	170.40
SW¼ of SE¼ 17-90-33	199.53
SE¼ of SE¼ 17-90-33	502.56

11 John E. Jordan.

NW¼ of SE¼ 30-90-33	$873.60
SW¼ of SE¼ 30-90-33	933.66

Alex Peterson.

NE¼ of SW¼ 4-90-33	$11.82
NW¼ of SW¼ 4-90-33	360.98
SW¼ of SW¼ 4-90-33	349.16
SE¼ of SW¼ 4-90-33	11.82
SE¼ of NW¼ 9-90-33	118.20
NE¼ of SW¼ 16-90-33	262.08
NW¼ of SW¼ 16-90-33	385.92
NW¼ of SE¼ 16-90-33	81.90
SW¼ of SE¼ 16-90-33	477.75
SE¼ of SE¼ 16-90-33	16.38

Par. 28. That said assessment was not paid by these Plaintiffs but the same went to bond and as Plaintiffs are informed and believed the same now draws interest at the rate of 6% per annum payable when the ordinary taxes are payable twice a year, to wit, in March

and in September of each year. That these Plaintiffs have been ready, able and willing and have offered to pay said interest on said assessments as required by law but that the County Treasurer of this county has refused to accept the same and still refuses although repeatedly having been requested to accept same and having been tendered the same, and these plaintiffs now tender and offer to pay the interest on said above described assessments and still offer to pay the same with the accrued interest on the same but the County Treasurer refuses to accept and has offered the lands of the Plaintiffs, as above described, for sale at tax sale and will
12 sell the same unless enjoined and restrained from so doing.

Par. 29. That on or about the 4th day of Dec., 1912, the said defendant Board of Supervisors of Pocahontas County, Iowa, passed a resolution and entered the same of record making a levy for special and drainage taxes for the year 1912 in Drainage District No. 29 of $682.00 to pay interest on bonds and $11,500.00 to pay outstanding indebtedness.

Par 30. That in making the tax list for the year of 1912, the County Auditor of Pocahontas County, Iowa, entered thereon against the District situated in Drainage District No. 29 a special assessment amounting to $12,634.03 of which amount the following amounts were entered against the lands of these plaintiffs, as above described, in the following amounts, to-wit:

William Brieholz.

NW¼ of SW¼ 21-90-33	$19.85
SW¼ of SW¼ 21-90-33	9.39
NE¼ of SE¼ 20-90-33	188.85
NW¼ of SE¼ 20-90-33	62.75
N. 10 acres SW¼ of SE¼ 20-90-33	15.56
N. 10 acres SE¼ of SE¼ 20-90-33	73.21

Joseph Stuart.

NE¼ of SE¼ 19-90-33	$98.93
NW¼ of SE¼ 19-90-33	88.46
SW¼ of SE¼ 19-90-33	53.15
SE¼ of SE¼ 19-90-33	51.85

Edward Korf.

NE¼ of NE¼ 20-90-33	$95.54
SW¼ of NE¼ 20-90-33	52.50
13 SW¼ of NW¼ 20-90-33	69.61
SE¼ of NW¼ 20-90-33	148.51
SE¼ of NE¼ 20-90-33	101.97

Mary Doyle.

S. Pt. SW¼ of SE¼ 20-90-33	$79.00
SW¼ of SW¼ 20-90-33	38.31
SE¼ of SW¼ 20-90-33	82.80
S. Pt. SE¼ of SE¼ 20-90-33	50.28

Charles F. Linnan.

NE¼ of NE¼ 17-90-33	$50.25
NW¼ of NE¼ 17-90-33	158.53
SW¼ of NE¼ 17-90-33	32.62
SE¼ of NE¼ 17-90-33	31.77
NE ¼ of SE¼ 17-90-33	31.77
NW¼ of SE¼ 17-90-33	32.68
SW¼ of SE¼ 17-90-33	35.20
SE¼ of SE¼ 17-90-33	96.26

John E. Jordan.

NW¼ of SE¼ 30-90-33	$167.35
SW¼ of SE¼ 30-90-33	178.86

Alex Peterson.

NE¼ of SW¼ 4-90-33	$2.23
NW¼ of SW¼ 4-90-33	69.15
SW¼ of SW¼ 4-90-33	66.86
SE¼ of SW¼ 4-90-33	2.23
SE¼ of NW¼ 9-90-33	22.62
NE¼ of SW¼ 16-90-33	50.18
NW¼ of SW¼ 16-90-33	73.91
NW of SE¼ 16-90-33	15.66
SW¼ of SE¼ 16-90-33	91.51
SE¼ of SE¼ 16-90-33	3.08

14 J. W. Clancey.

SW¼ of SW¼ 16-90-33	$159.06
SE¼ of SW¼ 16-90-33	285.57
NE¼ of NW¼ 21-90-33	106.68
NW¼ of NW¼ 21-90-33	59.60
SW¼ of NW¼ 21-90-33	35.54
SE¼ of NW¼ 21-90-33	15.66

Henry Smith.

NE¼ of SW¼ 19-90-33	$66.56
NW¼ of SW¼ 19-90-33	2.05
SW ¼ of SW¼ 19-90-33	14.90
SE¼ of SW¼ 19-90-33	53.15

P. S. Peiffer.

NE¼ of NE¼ 30-90-33	$40.93
SE¼ of NE¼ 30-90-33	119.55
NE¼ of SE¼ 30-90-33	54.60

Fred Duitsman.

NE¼ of SW¼ 30-90-33	$41.70
NW¼ of SW¼ 30-90-33	37.42
SW¼ of SW¼ 30-90-33	45.07
SE¼ of SW¼ 30-90-33	90.40

Garlies Tweedale.

Lot 3 section 31-90-33	$73.27
Lot 4 " 31-90-33	62.40

J. M. De Vaul.

SW¼ of SE¼ 18-90-33	$25.90
SE¼ of SE¼ 18-90-33	26.60

15 Par. 31. That the amounts so entered by the County Auditor on the 1912 tax lists exceed the amount ordered by the Board of Supervisors in the sum of $452.03.

Par. 32. Plaintiffs further allege and state the fact to be that the County Auditor in making up his tax lists for the year 1912, and in certifying the same to the County Treasurer of Pocahontas County, failed and neglected to specify the amount of the interest on the unpaid assessments that these Plaintiffs and Appellants should pay and also failed to specify separately the amount of said special assessment thus levied to pay for the alleged work done under the illegal contract with the Defendant S. F. Hiatt, as above alleged and these Plaintiffs and Appellants are unable to accurately estimate except in a general way, the amount of interest on the unpaid assessments, which they are ready, able, and willing and have at all times been willing to pay to the County Treasurer of Pocahontas County but to their best knowledge, and belief they should pay as interest on the unpaid assessment as found in the taxes of the year 1912, the following amounts:

Charles F. Linnan	$147.93
Mary Doyle	37.95
John E. Jordan	108.43
J. W. Clancey	207.40
Alex Peterson	124.56
William Breiholz	114.16
Edward Korf	100.25

and they tender and offer the same in open court and have heretofore offered to pay the same to the County Treasurer of Pocahontas

County, and he has refused to accept the same and now
16 threatens to sell the lands of these Plaintiffs and Appellants at tax sale and will do so unless restrained.

Par. 33. Plaintiffs and Appellants further state that said levy of $12,182. in Drainage District No. 29 on Dec. 4th, 1912, was made for the purpose of levying interest at the rate of 6% per annum upon the unpaid assessments then outstanding in said district and to produce a fund with which to pay the said Defendant S. F. Hiatt the amount agreed to be paid him under his said illegal, void, and unauthorized contract as above alleged and to provide for the deficiency of the funds that have been depleted and reduced in said Drainage District by the over-payment to the Defendant the Katz-Craig Constructing Company as above alleged, the sum of $1,782.84.

Par. 34. Plaintiffs further allege that said assessment and levy made by said Board of Supervisors on Dec. 4th, 1912, was arbitrarily and illegally made by said Board without the aid of any commission as required by law, without taking into consideration the value of the improvements made or contemplated to be made under the illegal contract with Defendant S. F. Hiatt; without taking into consideration what, if any, benefits the Plaintiffs' lands would derive from the changing, reopening, repairing, and deepening of the ditches draining in Drainage District No. 29 and said assessment as thus made is illegal, void, excessive, and unjust.

Par. 35. Plaintiffs further allege and state the fact to be that the excavations made by the said S. F. Hiatt under his contract were made in ditches which do not in fact affect the Plaintiffs' lands and in which said lands do not depend for drainage or outlet: That plaintiffs' lands receive no benefit whatever from the excava-
17 tions and improvements made by the said S. F. Hiatt in the main drain nor in Branch A; that no notice of hearing upon said proposed special assessment was given these Plaintiffs or any of the other persons interested in said Drainage District; that no hearing was had before the Board of Supervisors upon said proposed levy of $11,500.00 on Dec. 4th, 1912, and these Plaintiffs had no notice or knowledge thereof or the intention of the Board of Supervisors to make the same until long after the same had been made and spread upon the tax lists of said County.

Par. 36. Plaintiffs allege that said assessment thus made and levied on Dec. 4th, 1912, against their lands is illegal and void for all of the reasons above alleged and also for the following reasons:

(*a*) That the Board of Supervisors of Pocahontas County had no authority nor did they have jurisdiction to make said assessment and to levy the same as was done, against said lands in said district and especially the lands of these Plaintiffs and Appellants as above described.

(*b*) That said assessments were not levied or apportioned according to the benefits if any, that were derived by the lands of plaintiffs from said Improvement.

(c) That said assessment and levy made by the Board of Supervisors on Dec. 4th, 1912, was made contrary to the provisions of the Constitution of the United States and of the State of Iowa, and of statutes in such cases made and provided and is therefore levying an illegal tax on assessment against Plaintiffs' lands and is therefore contrary to law.

18 (d) That the same was levied and assessed on an erroneous and illegal and unjust method of classification and apportionment.

(e) That the same was levied and assessed to provide funds to pay for work alleged to have been done or to be done under an illegal and void contract and without authority of law.

(f) That the alleged work done under said contract with the said S. F. Hiatt Defendant was done for the betterment of lands other than the lands of the Plaintiffs and was done for their benefit and not for the benefit and not for the benefit of Plaintiffs' lands and therefore said taxes and assessment *is* illegal and void.

(g) That no public benefit, use, or utility was served or promoted by the work done under said illegal contract thus made with the said S. F. Hiatt but that said work was done for private parties for private purposes and therefore those benefited thereby should pay for the same and that the levying of the said taxes and assessments against the lands of the Plaintiffs is an attempt under the law to deprive unjustly said Plaintiffs of their property without due process of law, contrary to the Constitution of the United States and of the State of Iowa, and is therefore illegal and void.

Par. 37. That Plaintiffs have refused and still refuse to pay the amount entered upon the 1912 tax lists against the lands as above set out except that they are willing and hereby tender and offer to pay the amounts that may be determined against their lands as justly due as interest as required by law on the unpaid assessments that were levied by the Board of Supervisors of Pocahontas County on or about the 8th day of Nov., 1911.

Par. 38. That the said County Treasurer, John Forbes, of
19 Pocahontas County is proceeding to advertise the lands of these Plaintiffs for sale at the regular tax sale to be held on the 1st Monday in December, 1913, for the purpose of enforcing payment of amount so entered against their lands, and unless restrained by an order of this Court will sell Plaintiffs said lands at said sale.

19 Par. 39. That the Plaintiffs have no plain, speedy, or adequate remedy at law and unless a temporary restraining order is issued by this Court to prevent the sale of their said lands by the said John Forbes, the County Treasurer of Pocahontas County, Iowa, these Plaintiffs will suffer an irreparable injury and loss.

Wherefore, Plaintiffs pray that this Court issue a temporary order of injunction restraining the said John Forbes, County Treasurer from selling their lands as above described and upon the final hear-

ing of this cause the said temporary injunction be made permanent and forever restraining the County Treasurer of Pocahontas County from selling said lands as above described for the purpose of enforcing the payment of said alleged special assessment and that this Court decree that the action of the Board of Supervisors and the County Auditor of Pocahontas County in making the contract with the said S. F. Hiatt on June 9th, 1911, was void and said contract itself is void and of no force and effect in law and that the attempt to levy a special assessment against the lands of these Plaintiffs by the Board of Supervisors of Pocahontas County, Iowa, under and by virtue of the resolution of Dec. 4th, 1912, is unlawful and void and that the said S. F. Hiatt repay into the drainage fund of District No. 29 in the office of the County Treasurer of Pocahontas County, Iowa, the said sum of $10,538.02 and that he be required to surrender for cancellation and the County Auditor of Pocahontas
20 County, Iowa, be required to cancel the unpaid amount of the warrants so issued to the said S. F. Hiatt for $8,905.78 and repay into the drainage fund in the office of the County Treasurer said sum of $1,632.04 with interest thereon at 6% per annum from date of payment and that the Katz-Craig Contracting Company be required to repay into the drainage fund in Drainage District No. 29, in the office of the County Treasurer of Pocahontas County, Iowa, the said sum of $1,782.84 with interest thereon at the rate of 6% per annum from the 30th day of July, 1910, and that the County Treasurer of Pocahontas County, be restrained from collecting, attempting to collect, or enforcing collection of said alleged special assessment thus levied by the Board of Supervisors of Dec. 4, 1912, and that the said County Treasurer of Pocahontas County, Iowa, be further restrained from paying to the said S. F. Hiatt, Defendant, any further amounts of money on any warrants issued to the said Defendant, S. F. Hiatt, by virtue of or under authority of the said illegal contract made and entered into by the Board of Supervisors and County Auditor of Pocahontas County, Iowa, under date of June 9th, 1911, and for such other full, complete, entire, and equitable relief as equity can give and for the costs of this action.

T. F. LYNCH,
Attorney for Plaintiff.

STATE OF IOWA,
Pocahontas County, ss:

I, J. W. Clancey, and Alex Peterson, being duly sworn on oath do say that I am one of the Plaintiffs named in the above entitled cause of action and who signed the above petition; that I signed the
21 same for myself and for the other Plaintiffs interested with me in said cause of action; that I have read the above petition, know the contents thereof and that the facts and things as therein stated are true as I verily believe.

J. W. CLANCEY,
ALEX PETERSON.

Subscribed in my presence and sworn to before me by the said J. W. Clancey and Alex Peterson this 25th day of November, 1913.

T. F. LYNCH,
Notary Public in and for Said County.

That on the 26th day of November, 1913, the following order allowing temporary injunction was issued:

Order Allowing Temporary Injunction.

Now, to wit, on this 26th day of November, 1913, upon reading the within petition, hearing the evidence offered in support thereof it is hereby ordered that a writ of injunction issue as therein prayed for restraining the Defendant John Forbes as County Treasurer of Pocahontas County, Iowa, from enforcing the collection of the alleged special assessments against the lands of the Plaintiffs as herein described and in the following amounts, to wit:

Alex Peterson SW¼ of 4-90-33, $70.23.
Alex Peterson, E½ of NW¼, 9-90-33, $11.31.
Alex Peterson, W½ of NE¼ and SE¼ and N½ of SW¼, 16-90-33, $117.17.
J. W. Clencey, S½ of SW¼ of 16-90-33, $444.63.
C. F. Linnan, E½ of 17-90-33, $469.02.
Edward Korf, S½ of the NW¼ of 20-90-33, E½ of NE¼ and SW NE 20-90-33, $510.48.
22 J. M. DeVaul, S½ of SE¼ 18-90-33, $52.50.
William Breiholz, N½ of SE¼ of 20-90-33 and W½ of SW¼ of 21-90-33, and N 10 acres of SW¼ of SE¼ of 20-90-33, and N 10 acres of SE¼ of SE¼ of 20-90-33, $340.47.
Mary Doyle S½ of SW¼ of 20-90-33, $121.11, S¾ S½ of SE¼ of 20-90-33, $129.28.
J. W. Clancey, NW¼ of 21-90-33, $217.48.
P. S. Peiffer E½ of NE¼ and NE¼ of SE¼ 30-90-33, $215.08.
John E. Jordan, W½ of SE¼, 30-90-33, $346.21.
Fred Duitsman, SW¼ 30-90-33, $107.29.
Garlies Tweedale, Lots 3 and 4, Section 31-90-33, $135.67.
Also interest and costs on the above taxes.

Upon the filing of a bond in the office of the Clerk of the District Court of Iowa, in and for Pocahontas County conditioned as required by law, in the penal sum of $1,000.00, with sureties to be approved by the Clerk of the District Court, said injunction when isued shall restrain the said John Forbes as County Treasurer of Pocahontas County, Iowa, from enforcing the above taxes and special assessments against the lands above described of these Plaintiffs.

D. F. COYLE,
Judge of the 14th Judicial District.

On the 1st day of December, 1913, the following writ of injunction in said cause was issued:

23 *Writ of Injunction.*

STATE OF IOWA,
Pocahontas County, ss:

To John Forbes, Defendant:

Whereas: William Breiholz, Edward Korf, Joseph Stuart, Mary Doyle, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan,

Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitsman, and J. M. DeVaul, as Plaintiffs has this day filed in the office of the Clerk of the District Court of the State of Iowa, in and for Pocahontas County, a petition duly sworn to, making John Forbes and others, Defendants therein, and praying for an allowance of a writ of injunction:

And whereas, the Honorable D. F. Coyle, Judge of the District Court of the State of Iowa, in and for Pocahontas County, has on the 26th day of November, 1913, made an order allowing said writ of injunction to issue upon the filing of a bond with sureties pursuant to said order; and whereas, said order has been complied with and such bond filed and sureties approved;

Now therefore, you the said John Forbes County Treasurer of Pocahontas County, Iowa, and others, Defendants as aforesaid, are hereby strictly enjoined and restrained from enforcing the collection of the alleged special assessment of taxes in Drainage District No. 29, in Pocahontas County, Iowa, against the lands of the plaintiffs described and set out as follows: Alex Peterson, the SW¼ of 4-90-33, $70.23; the E½ of NW¼ of 9-90-33, $11.31; W½ of NE¼ and SE¼ and N½ of SW¼ 16-90-33, $117.17; J. W. Clancey, S½ of SW¼ 16-90-33, $444.63, and NW¼ of 21-90-33, $217.48; C. F. Linnan, E½ of 17-90-33, $469.02; Edward Korf, S½ of NW¼, E¼ of NE¼ and SW¼ of NE¼ of 20-90-33, $467.83; J. M.
24 De Vaul, S½ of SE¼ of 18-90-33, $52.50; William Breiholz, N½ of SE¼, N. 10 acres of SW¼ of SE¼ and the N 10 acres of SE¼ of SE¼ of 20-90-33, $340.47, and W½ of SW¼ of 21-90-33, $29.24; Mary Doyle, S½ of SW and S¾ of S½ of SE¼ of 20-90-33, $250.39; P. S. Peiffer, E½ of NE¼ and NE¼ of SE¼ of 30-90-33, $215.08; John E. Jordan, W½ of SE¼ of 30-90-33, $346.21; Fred Duitsman, SW¼ of 30-90-33, $107.29; Garlies Tweedale, Lots 3 and 4, Sec. 31-90-33, $135.67, including the costs and interests on the above taxes, and to prevent the sale of said lands by you the said John Forbes, County Treasurer, at the regular tax sale to be held at Pocahontas, Iowa, to be held on the first Monday in December, 1913, until the further order of our District Court in the premises, and this injunction you must strictly observe under the penalties of the law.

Witness, W. E. Bollard, Clerk of said Court, with the seal thereof affixed hereto this 1st day of December, 1913.

[SEAL.]

W. E. BOLLARD,
Clerk of the District Court.

STATE OF IOWA,
Pocahontas County, ss:

I, M. M. Noah, Sheriff of said County, hereby certify and return that I received the within writ, on the 1st day of December, 1913, and that I personally served the same on the within named John Forbes, County Treasurer, Defendant, on the 1st day of December,

1913, in said County, by reading the same to him and by delivering to him a copy of this notice.

M. M. NOAH,
Sheriff of Pocahontas County, Iowa.

Fees $2.35.

25 On Jan. 23, 1914, the Plaintiffs filed the following:

Amendment to Petition.

Come now the Plaintiffs, and amend their Petition hereinbefore filed, by adding immediately following Paragraph 36 thereof, the following, to wit:

Paragraph 36 A.

The plaintiffs further allege that the said assessment made, or attempted to be made and levied against their lands, on or about December 4, 1912, is void, for the following reasons, to wit:

(*a*) Because the said levy, or attempted levy was made without any notice, hearing, or opportunity for a hearing, or opportunity to the owners of said lands, or the plaintiffs in this cause, to object to the same, or to the apportionment thereof, or the classification of their lands, and the same constitutes the taking of the lands of the plaintiffs and depriving the plaintiffs of their property without due process of law, contrary to Article XIV, being the 14th Amendment to the Constitution of the United States.

(*b*) That the section of the Iowa Statute, to wit, Code Supplement, Sec. 1989-*a*-21, in providing for, or authorizing the assessment or levy of such tax without notice, hearing, or opportunity therefor, to the land owners whose property is sought to be burdened with such assessment and levy, is in contravention of, and in violation of the said 14th Amendment to the Constitution of the United States in that it deprives these plaintiffs of their property without due process of law, and such statute and the assess-
26 ment or levy made thereunder, is therefore void and of no effect.

(*c*) And further, that said statute is void and in contravention of said constitutional provisions of the State of Iowa and the United States, because it makes no provision for a hearing, or opportunity to be heard, by the interested parties and those against whom and whose property, assessments and taxes are thereby authorized to be levied, upon the question of the property or necessity of the improvement, enlargement or repair, or upon the question of whether the benefits which will result therefrom will accrue to the property or owners, in the same proportion as the original apportionment and assessment or upon the question of whether any benefits will accrue to all of the property assessed for the original improvement.

(*d*) That the said pretended levy and assessment being made without notice or information to the plaintiffs or property owners, and without any hearing or opportunity therefor, either in respect to the property, or necessity of the improvement or the apportionment of the tax or the distribution of the burden thereof, is void because it is in violation of the provisions of Section 9 of Article I, of the Constitution of the State of Iowa, and because thereby, the plaintiffs are sought to be deprived of property without due process of law, and the same violates the Fourteenth Amendment to the Constitution of the United States; and the plaintiffs expressly claim the benefit and protection of said constitutional provisions.

(*e*) That said Section 1989-*a*-21 of the Code Supplement, in authorizing the making of the enlargement of the ditch and drain and the pretended assessment and levy without notice to the
27 said property owners, or hearing or opportunity therefor, is in contravention of the said Section 9 of Article I, of the Constitution of the State of Iowa, in that it authorizes the taking of property without due process of law.

Paragraph 36 B.

The said assessment and levy and the ordering of the enlargement, changes and additions to said improvement, were made without any hearing or notice, or any opportunity for hearing, and the said assessment and levy is in contravention of the provisions of the Constitution of the United States and of the State of Iowa, forbidding the taking of private property without due process of law, and is in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States, and of said Section 9 of Article I, of the Bill of Rights in the Constitution of the State of Iowa, and the provisions of Section 1989-*a*-21 of the Supplement of the Code of Iowa and other provisions of the statute in reference to the levying of assessments and taxes for the payment of drainage improvements, in so far as they authorize the establishment or ordering of the improvement and the making of such levy or assessment, without any hearing or opportunity for hearing, are void because in contravention of the said provisions of the Constitution of the United States and of the State of Iowa.

Paragraph 36 C.

And the plaintiffs further state and show the court that the said levy and assessment in this petition referred to, were not,
28 and are not required for the payment of the original improvement in accordance with the classification and apportionment in the construction of said improvement as originally constructed. That the said moneys are sought to be raised by said levy and assessment in large part for new and enlarged ditches and improvements, for the purpose of benefiting, and the same will benefit only a portion of the property and property owners whose property was assessed for said original improvement, the said prop-

erty and persons being other than the property of, and the plaintiffs described in this petition.

That the plaintiffs were because thereof, entitled to be heard in reference to the establishment and ordering of the improvement and the classification of their lands in ratio to the benefits and apportionment of the said tax, and before the same was spread, levied or assessed. That no notice of any hearing or any intention to make said levy or assessment, or to spread the said taxes was ever given to the plaintiffs, and no opportunity to present to the said Board of Supervisors, the claim of the plaintiffs in reference to a just and equitable apportionment of the said levy and assessment. That the amount of the tax to be exacted against the plaintiffs depended upon, and should be apportioned in equitable ratio in reference to the benefits derived from the improvement for which such expenditures was made, or sought to be made. And the plaintiffs aver and state that upon any notice or hearing, they would be entitled to show, and show, that all benefits to be derived therefrom would accrue to property and persons other than the plaintiffs or their property. That the said pretended levy and assessment constituted the actual taking of the private property of plaintiffs, without notice
29 and without any opportunity for hearing and without any opportunity to show that the original classification and apportionment, though just and equitable as to the cost of the original construction, is wholly unjust and inequitable to the plaintiffs, in so far as it involves the expenditures for which the said levy and assessment were made and now sought to be enforced.

T. F. LYNCH,
KELLEHER & O'CONNOR,
Attorneys for Plaintiffs.

The following answer was filed by all of Defendants except the Katz-Craig Contracting Company.

Answer in Equity No. 4152.

Come now all of the Defendants except the Katz-Craig Contracting Company and answering the petition state:

Par. 1. That they deny said allegations of said petition except such as are herein admitted.

Par. 2. Defendants admit the statements contained in paragraphs 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 20, 21, and 22.

Par. 3. These defendants admit that the Katz-Craig Contracting Company were overpaid in the sum of $1,782.84; they allege that said overpayment occurred through inadvertence and mistake and without any fraud or wrong doing of either of these defendants; they state that they have caused an action to be instituted against the said Katz-Craig Contracting Company in district court of Douglas County in the State of Nebraska for the recovery of said overpay-

ment that said action is now pending in said court and that
30 these defendants are advised by counsel that a judgment will eventually be secured for said overpayment, that as to whether or not said judgment (if obtained) can be realized on execution these defendants cannot state.

Par. 4. That the said Drainage District No. 29 was regularly established and comprises many thousands of acres within Pocahontas County, Iowa; that the acreage owned by the Plaintiffs is a very small portion of the total area of the district; that in due course and in the manner prescribed by law the assessment of benefits derived to plaintiffs' land by the improvements in the district and the rate and proportion of such benefits and the proportion of assessments upon the plaintiffs' lands were fixed and settled long before the institution of the present suit; that the plaintiffs have now been heard upon the question as to the amount and rate of assessment for benefits in the tribunal established by law and such assessments have been fixed by the Board of Supervisors of Pocahontas County through resolution properly entered; that neither of the plaintiffs took any appeal or exceptions to the action of said board in fixing such rate of assessment; that the contract with Hiatt was made in good faith and without fraud and for the purpose only of repairing the improvements in the said district; that it was the duty of the Board of Supervisors to keep such improvements in repair and for that purpose it made the contract with said Hiatt so that such improvements could be enlarged, reopened, deepened, widened and repaired and that such contract with Hiatt and the work contemplated thereby was by the board considered to be for the best interest of the public rights effected; that the costs of such repairs were assessed and levied by the board upon the lands
31 in the said district in the same proportion as the original expenses and costs of construction were levied and assessed; that all the levies and assessments made, contemplated or recommended in the said district were legal, necessary and proper for the repair of the improvements in the district.

Par. 5. That all of the levies and assessments described in the petition were and are necessary and proper for the repair of the improvements in said district as stated above; that all of the money contemplated to be raised by said levies will be necessary to meet the cost of said repair work and because thereof the board made said levies.

Par. 6. That if the plaintiffs are permitted to have the relief prayed for by them or either of them or any part or portion of it then the burden of and repair work and the cost thereof will be thrust upon the owners of the other lands in the district and thereby the plaintiffs will receive a wicked, illegal and unconscionable advantage and thereby the costs of repairing such improvements will be thrown upon the other landowners in the district and these plaintiffs will themselves escape the burden of paying any part of said repairs; that the assessments upon plaintiffs' land are necessary to pay for such repairs, which have now all been completed, and war-

rants drawn upon the funds of the district properly drawn have been issued for said repairs.

Par. 7. That plaintiffs well knowing of the said contract with Hiatt and knowing that the consideration for said contract would be levied upon the lands in the district and that a proportion of said consideration would be levied upon plaintiffs' lands, nevertheless stood by without objection and permitted the work con-
32 tracted for by Mr. Hiatt to be completed or without any objection or exception upon the part of any one of the plaintiffs; and the plaintiffs and all of them are now estopped from objecting to the said assessments or any part of them.

Par. 8. That the order and resolution for the fixing of assessments and proportions thereof for construction of such original improvements, together with all repairs thereafter necessary was made on full notice to plaintiffs and on full opportunity to be heard; and such resolution and order cannot now be attached by these plaintiffs, but the same has become fixed as against plaintiffs by their failure to appeal therefrom and by the final action of the tribunal having jurisdiction in the matter.

Wherefore defendants ask that the petition be dismissed with costs.

F. C. GILCHRIST,
Attorney for Said Defendants.

The Defendant S. F. Hiatt filed the following.

Answer and Cross-Petition.

Now comes the defendant, S. F. Hiatt, answering the petition of the plaintiffs herein, and denies each and every averment and allegation contained in said petition, except what is hereinafter expressly and specifically admitted.

This defendant does admit that heretofore there was lawfully established Drainage District Number Twenty-nine (29), Pocahontas County, Iowa.

This defendant does admit that heretofore he entered into and contracted with the proper officers and board for certain work
33 involved in the repair and completion of the drainage ditch located in said district as aforesaid.

This defendant does admit that a sum of money has been paid him for the work done by him as aforesaid.

This defendant does admit that there is had and owing from him as a balance for the construction of said ditch the sum of approximately Six Thousand ($6,000.00) Dollars.

Aside from the admissions herein made of record this defendant has neither knowledge or information sufficient to form and to be as to the verity of the other allegations contained in the plaintiffs' petition, and he therefore demands that the plaintiff be required to adduce strict proof thereof.

Cross-Petition.

The defendant, S. F. Hiatt, for affirmative relief alleges and states to the court:

Par. 1. That heretofore he entered into a certain contract with the proper officers and board of Pocahontas County, Iowa, for the completion and repair of a certain ditch located in Drainage District Number Twenty-nine (29), Pocahontas County.

Par. 2. That said drainage district was lawfully established as by law provided.

Par. 3. That these plaintiffs are the owners of real estate located in said district.

Par. 4. That the occupation and different positions of the defendants are as alleged in plaintiffs' petition.

Par. 5. This defendant further states that he has fully complied with all of the terms and requirements of his said contract,
34 and with the terms and requirements of the law governing the same.

Par. 6. That the work in the construction and repair of said ditch was had and done by him as by law provided.

Par. 7. That said work and said ditch has been accepted and approved by the engineer in charge of said work and by the Board of Supervisors of said county.

Par. 8. That the defendants and each of them, with the exception of defendant, Katz-Craig Contracting Company, have refused and do refuse upon order of this court to pay this defendant the amount now due him for the construction of said work.

Par. 9. This defendant states that he has no plain, speedy or adequate remedy at law.

Wherefore, and by reason of the above and foregoing premises this defendant prays that the writ of injunction in this cause heretofore issued may be dissolved, and that the Board of Supervisors of Pocahontas County, Iowa, and the County Treasurer, and County Auditor of said county may be, by order of this court, required and commanded to take, adopt and perform such steps, measures and procedure as will lead to the payment of this defendant's claim, as herein set forth; and this defendant prays for such other, further, different and adequate relief as is equitable.

ROBERT HEALY,
Attorney for Defendant, S. F. Hiatt.

Duly verified.

On March 22, 1915, the following was filed by the Defendants.

35 *Answer to Amendment to Petition.*

For answer to the Amendment to the Petition of the Plaintiffs these Defendants now come and say that they deny all of the allegations therein contained except as the same are admitted by the Answer already filed by these Defendants, and they ask that the original Answer shall stand as an Answer to such Amendment.

F. C. GILCHRIST,
Attorney for Defendants.

On Oct. 18th, 1915, the Defendant S. F. Hiatt filed the following

Amendment to Answer and Counterclaim of S. F. Hiatt.

This defendant further avers that all of the work in cleaning out and repairing the ditch and drain referred to in this defendant's answer and counterclaim has been finished and completed and said Drainage District and this plaintiff have accepted the benefits accruing from said work of repair and cleaning said ditch and the same has improved and benefited their lands and that by reason of the foregoing premises the plaintiffs and all of this defendant's co-defendants are estopped to deny that this defendant is entitled to the relief which he seeks herein

On Oct. 21, 1915, the Defendant S. F. Hiatt filed the following

36 *Statement and Offer in Cause No. 4130 and No. 4152.*

Now comes S. F. Hiatt, defendant, in each of said causes and herewith and hereby offers to do and perform equity in each of said causes.

S. F. HIATT,
By ROBERT HEALY,
Attorney.

On the 30th day of January, 1914, the following entry was made and entered of record in District Court Record No. 8, page 110, "And now on this 30th day of Jan., 1914, this cause is consolidated with No. 4130. Same entry as in No. 4130, as of this date."

On March 23, 1915, the following stipulation was made and entered of record.

Stipulation.

By Mr. F. C. Gilchrist: Come now the parties, by their respective attorneys, and with reference to the order made by Judge Coyle at the January, 1914, term of court to the effect that the parties should take evidence in writing, and the parties now stipulate and agree as follows: That the plaintiffs shall take their evidence and complete the taking of the same by the 21st day of April, 1915; that such evidence shall be taken at such place as the parties may elect, not exceeding forty miles from this Court House; that the plaintiffs

shall give notice to defendants' counsel of the time and place of taking such written evidence at least five days before the commencement of the taking thereof; that the plaintiffs shall take and
37 complete the taking of their evidence on or before the 21st day of April, 1915; that the defendants shall thereupon have until the 5th day of May to take their testimony in writing, and they may elect where it shall be taken and give like notice; that rebuttal testimony shall then be taken within three days after the defendants have completed their evidence, and then that surrebuttal shall be taken within three days after that; that objection will not be urged that this may require defendants to take evidence during the May term of court; that the case shall be submitted upon written testimony to Judge Coyle, under the order as made, provided the testimony is completed before the May term, and if it is not completed then that such case shall be submitted to Judge Lee, or the presiding Judge of this Court, whoever he may be, at the May term, 1915, of this Court, and that the order shall stand in other respects as made, this stipulation being made in furtherance of such order of Judge Coyle at the January, 1914, term; that this evidence shall be taken by Mr. Thurlow Taft, unless the parties agree to some other person, and the parties agree to agree upon some other person if possible.

By Mr. F. C. Gilchrist: Is this agreed upon?
By Mr. Robert Healy: Yes, sir.
By Mr. T. F. Lynch: That is all right.

Pursuant to said stipulation the following evidence was taken:

"It is stipulated and agreed between the parties to said action that the records and files of the County Auditor's office, pertaining to the proceedings of Drainage District No. 29 in said County may be introduced and read and used in evidence by either party and that the identification of such records and files is waived.
38 It is agreed between the parties that upon the hearing of this case by the Court all of the records and files including engineer's reports, plats, profiles, estimates, and minutes of resolutions of the Board of Supervisors, reports of commissioners, both on assessments, and damages and contracts with the contractor whether of record or on file may be read and used as exhibits subject to the right of any person to urge objection that the whole or any part of the same is irrelevant, immaterial, and incompetent to the issue, but that no objection will be made to the manner or form of the proof itself, that no objection will be urged that the papers are not the best evidence but that the substance of these papers or records themselves may be objected to for any legal reason urged at the time of the submission."

On Apr. 16, 1915, at Fonda, Iowa, the following evidence was then taken:

ED. CARTER, being duly sworn on behalf of Plaintiff, testifies as follows:

Have lived in Fonda, Iowa, for about seven years. Have been leveling down dredge banks. Know the ditch in this community, which is called District No. 29. Exhibit "C" offered in evidence. I recall an occasion when Mr. Hiatt was doing some work on this ditch in question. I worked for Sam all summer. It was the 2nd of April, three years ago I commenced. I worked for him all summer.

Q. Now I wish you would examine this Exhibit "C" and
39 tell us as near as you can where you worked, Mr. Carter.

A. This is on the Branch that comes up through the Town Lot Co.—. That is what you are getting at first?

Q. Yes, on Branch A first.

A. Well I commenced at the outlet on this Branch and worked up as far as we went. Up very near to the road—say twenty rods of the road.

Q. The east and west road?

A. Yes, sir. Almost to the Illinois Central railroad track.

Now the Illinois Central on this Exhibit "C" is marked "I. C. R. R." and the other railroad track is marked "C., M. & St. P. R. R." Between these two points at the outlet I made from the outlet to the north side of the Milwaukee track with team and scraper and from there on up as far as we went I sloped the west side with team and scraper. Mr. Hiatt was working there then over on the other side cleaning out. I cleaned the west side and he the east side.

Q. Describe as best you can how much you enlarged that ditch?

Objected to by the Defendants as irrelevant, incompetent, and immaterial. Not based upon any statement of fact and because furthermore the parties would be bound to pay for the work that was properly done even though additional work was done, which additional work might have been unauthorized; and further there has been proof offered and suggested that additional work was paid for beyond what was legitimate repairs in the district.

A. Why we made it about three feet deeper and fully five
40 and one-half feet wider at the bottom with a slope—oh, we must have sloped it one and one-half to the foot. Sam cleaned out the bottom and I sloped on the west side with team and scraper. I went down the side of the ditch about three feet. This continued throughout the length from the Chicago, Milwaukee & St. Paul track north, as far as we went on Branch A.

Q. I want to know whether you dug the ditch deeper than originally constructed?

Same objection by Defendants as before.

A. Yes, sir.

Q. How much deeper?

A. About three feet.

I know of a galvanized corrugated iron culvert in the road running east and west across this ditch. We excavated right around the

neighborhood of three feet lower than the culvert. That culvert is in the road in this ditch on what is marked on this map, the J. W. Busby farm on Section Thirty-four immediately south of Fonda. Mr. Hiatt used dynamite to loosen the earth in the bottom of that ditch along that line.

Q. And just explain how he did that Mr. Carter?

A. Got into the bottom of the ditch and used—well it is a drill or auger for that purpose to bore holes in the bottom of the ditch. Put dynamite in and exploded it.

Q. How long a distance did this work extend where the dynamite was used?

A. Well, I should think in the neighborhood of five or six rods. It was used because the bottom was so hard it could not be removed; on account of the hard ground, gravel in the bottom of the ditch.

41 Q. Mr. Carter was this after or before the mud and slush in the bottom had been cleaned out?

A. Well——

Q. That the dynamite was used I mean.

A. Do not think there was any mud in there—No.

I worked on the main line of the ditch. Commenced on Mrs. Pat. Kelly's, here at the road on the west side of Mrs. Pat Kelly. Worked from here clear up around to old lady Woods' west line, marked Sarah T. Woods on this plat. All I did on this main line was to level the banks for Sam on the main ditch clear up to Mrs. Woods' line. While I was thus engaged Hiatt was working on the job. Hiatt quit working on the main line at the west line of the Woods farm. There was a place in the main line of the ditch where Hiatt used dynamite. That was over in the Mercer place, marked the James Mercer land on the plat. Could not tell how much deeper he dug that than originally dug. On this main line I worked the banks down so he could get the machine over.

Q. I want to refer again to Branch A. Had it been excavated above the point where you quit work before you cleaned it out?

A. Yes, sir.

Q. And did you make it as wide or any wider than it was before that point?

Objected to by the Defendants for the same reason as urged in the last objection.

A. Oh, I should think it would be a little wider.

Q. Was it deepened any below that or as deep?

Same objection.

A. Well, counting the fill up on the other it would be lowered quite a bit. Two and one-half feet probably.

42 Cross-examination:

Mr. Hiatt was a good workman. A hard working man. Did his work properly and in good shape.

Witness recalled:

We started to clean the main line of the open ditch in 29 on the SW¼ of Sec. 35, in Cedar Twp. on the west side of the Milwaukee railroad. We cleaned out up to Sarah T. Woods on the line of the E½ of the SE¼ of Section 36. That is the west line on the east side. There was no cleaning out or digging from there on up to the entrance, of lateral B.

Q. Now Mr. Carter, going back to Branch A, and that portion between the Milwaukee and the Illinois Central railroad track, did you see the first ditch that Sam Hiatt constructed on that land?

A. Yes, I saw that.

Q. What were you doing there? How often were you there?

A. When we moved there with the machine to clean out the last time, I saw the ditch and I was going to work for Sam down here on the same ditch when he was scraping it out with horses when we were first building it.

Q. Are you familar with both ditches; the original ditch and the cleanout?

A. Yes, sir.

Cross-examination:

I never took any levels on the original ditches constructed
43 by Hiatt. Had no reason to pay any particular attention to the original ditch as originally constructed until we moved back and cleaned it out. The cleanout was possibly two and one-half to three feet deep on an average.

Redirect examination:

I think we cleaned the ditch below the original ditch full a foot. We widened out the bottom from four feet to about five and one-half feet. Must have widened out the top at least three feet. The banks that we widened out were solid. This ditch had filled some. It was a slow grade originally and likely to fill in. I do not think the sides were crumbling.

Q. As to Branch A, you yourself did not do the cleanout at all? That is, all you did was to slope up the west bank?

A. Oh, that is on the Busby land. I made from the Milwaukee track to the outlet with team and horses.

Q. That is on the cleanout job?

A. From the Milwaukee is about eighteen rods to the outlet, and I made that.

Q. Now below the railroad, state whether or not you widened that?

Objected to by the Defendants as incompetent, irrelevant, immaterial, leading and suggestive.

A. Yes, lowered it fully a foot and a half, and widened it—I think that is at widest part of the ditch.

Q. Where it empties into the main, how much did you widen it?

A. That must have been widened down at the south entrance of

outlet, I must have made it fully three feet wider than it was down there.

44 Further cross-examination:

At both sides of the railroad it was a slough or swamp. Right south of the railroad it may have been a swamp once but I wouldn't call it one. It was very low, wet ground. Probably a swamp originally, at the mouth of where Branch A emptied into the main.

FRED PETERSON, on behalf of Plaintiff, testified as follows:

Live in Fonda. Am twenty-nine years old. Know the ditch near Fonda, called District No. 29. I worked on part of that ditch. I worked on Branch A and the other side of the railroad south of the Illinois Central. I also worked north of Alec Dunne's land. I saw the Branch A ditch below where I worked from there to where it had outlet into the main ditch before it was cleaned out. We started right on the end of this open ditch and went northeast. The ditch we dug was larger than the other before cleaned out. It must be two feet deeper I should judge. About twice as wide than what it was before. Sam Hiatt constructed Branch A originally. I remember the occasion when Mr. Hiatt and Mr. Carter were cleaning out and enlarging this ditch between the two railways. The ditch when they finished working on it the second time, was wider and deeper than it was when Sam Hiatt fixed it the first. It must be, in my judgment, right around three feet wider if not more. Must have been two and one-half feet deeper. I know the steel culvert being put in in that ditch in the road at the north side of the Busby land. It was put in right after the first open ditch was made with teams. Mr. Hiatt was
45 working there first with teams. I think that the culvert was laid a little lower than the bottom of the ditch as originally dug, four or five inches after Mr. Hiatt worked there the second time. The culvert was about a foot and a half higher than the bottom of the ditch as Hiatt left it the second time. I think the ditch was widened on both sides at the time Hiatt and Carter were working there the second time.

Cross-examination:

I am working at leveling ditch banks now for Mr. Carter. Am not related to any of the parties to this suit. Helped Sam Hiatt dig this ditch originally. Worked right down through Busby south of Fonda one and one-half days. I never took levels on the ditch originally dug. I was out there one time and Sam told me to see whether it was deep enough or not. I helped a man named Barnes put an open ditch somewhere on Alec Dunne's farm. We started at the end where Sam left off the open ditch and went down, I judge, about a foot and a half deeper than the old ditch. Barnes had the contract and I was helping him. Worked for

Barnes I should judge about eight weeks. I didn't keep posted on the time. It must have been three years later than when Sam dug his ditch. Went out there for Lew Barnes and came down to the Illinois Central railroad track with teams making ditch a one and one-half feet deeper than we found Sam's ditch. Excavated about one and one-half feet deeper than it was at the Illinois Central and farther south.

46 Redirect examination:

I saw this Hiatt ditch after it was completed the first time. Maybe every week, or such a matter. Farmed near there. I saw it frequently after it was cleaned out and enlarged.

Recross-examination:

My memory is rather indistinct as to dates and years. Could not tell the time without refreshing my memory. I have been too busy.

ED RATHBUN, testified on behalf of Plaintiffs, as follows:

Have lived in Fonda, Iowa, for thirty-two years. I remember the time when Mr. Hiatt was constructing the ditch, Lateral A or Branch A in District 29. I follow the occupation of tiling. I had occasion to examine this Lateral A or Branch A after it was constructed by Mr. Hiatt, I think about 1912. I made surveys for tile to be emptied into it. Those surveys were made I think in the spring of 1912.

Q. 1912? Now examine this map. Identify it as Exhibit C and tell us Mr. Rathbun where you made these surveys for the tile drain to empty into this Branch.

A. Well, the first ditch began about two hundred feet north of the road. South side of Section 26 I believe—27. About two hundred feet north of that culvert.

Q. You mean the culvert in the road at the north side of the Busby land?

47 A. Yes.

Q. And how far north of that culvert did this twelve inch tile empty into the ditch?

A. I should say about two hundred feet.

Q. How deep did you find the ditch at that point?

A. Something like two ten.

Q. Two feet and ten inches?

A. Yes.

This was a couple hundred feet north of the culvert in the road. Two other tile emptied into it. One probably seven hundred feet north of that and the other maybe one thousand feet north of the first one. Could not tell how deep the ditch was where those two tile laterals emptied without referring to my level book. I have my level book. The first one named A was a twelve inch, open ditch, where we set stake on the bank it was two ten deep. Branch

B, I call the second one, was two nine, and C, the third Branch, is two nine. I have examined this ditch after it was cleaned out and enlarged by Mr. Hiatt. I have been down two or three times since it was widened out. I was at the ditch three or four different times before it was cleaned out and enlarged.

Q. What do you say as to whether that ditch is any larger since it was cleaned out by Mr. Hiatt than it was originally constructed?

Objected to by Defendants as irrelevant, incompetent, and immaterial. And for the further specific objection that the witness himself is incompetent to answer the question, for the reason that he has not shown himself familiar or acquainted with the way and the conditions in which the ditch was originally constructed and the question is further objected to as leading and suggestive
48 and calling for an opinion or conclusion of the witness.

A. It was about twice as wide and would be two and one-half feet deeper.

I made measurements in the fall of 1914 to ascertain the yardage which would be excavated from the ditch after cleaning out and enlarging it. We began where the Barnes ditch began and where Hiatt left it the first time. We measured across the top. Took top measurements, stepped down and took bottom measurements. Took a level on one side of the top then levelled and centered the bottom then went down one hundred feet and did the same thing and so on down the ditch each hundred feet. Took top measurements and bottom measurements for width and also for level of top and bottom. Did the same thing at intervals of one hundred feet along the ditch Hiatt had cleaned out. Made figures to show the result. Paper given and identified by the reporter as Exhibit D, offered in evidence. (This paper cannot be found so as to be abstracted herein.)

Q. You may state whether the figures upon the sheet which the reporter has marked "D" is the result of the computations and measurements you made?

A. First column, that is the measurement taken, we began at that. That will simply be the stake number we staked the ditch. The figures at the top represent the point where we started at the junction of the Barnes and Hiatt ditches, and one, two, three, four, and so on down would indicate the points in the ditch at intervals of one hundred feet where we took measurements. The second column represents the depth of the ditch in feet and inches. The third column indicated the average width in feet and
49 inches. The fourth column represents the yards, in each one hundred feet. At the bottom of the sheet the figures which marked end of ditch, represent the end of main dredge from the bridge down to the creek where the end of the old dredge originally was. That was the portion that was dug over in Calhoun County. Those measurements are correctly made. I did not see Mr. Hiatt working on this ditch when he originally constructed it. It might have been a year afterwards before I saw the ditch. Branch A of the tile started eight inches under water

from the bottom of the tile. Branches B and C started about three inches. There was not enough water in the open ditch at that time to amount to anything. I saw those tile outlets after the ditch was enlarged by Mr. Hiatt the second time he worked there. They were then about two feet above the bottom of the ditch.

Cross-examination:

I was in Dakota at the time Hiatt did his first work. It was probably two years after Hiatt did this work that I took the measurements. Branch A between the railroad passed through some very low wet swamp lands. Immediately north of the Busby land there was low, wet, swamp and slough originally. I call Branch A on the plat Main A, the twelve inch tile I call Branch A. This was put in at one side of the swamp. I outletted it into the Hiatt ditch. The Hiatt ditch was about two feet eight inches deep. I notice on this plat about at a point along the line of the Hiatt ditch seven hundred or eight hundred feet north of the Busby land is also shown a swamp or pond. I made no measurements of
50 this ditch Hiatt dug at the time he had finished it. Two years before I took the survey for Branches A, B, and C. The figures which are shown on Exhibit D were made in the fall of 1913. The Barnes ditch was dug the winter or fall of 1912. To my best judgment the first time I saw the Hiatt ditch to examine it was about two years after completion.

Redirect examination:

In making these measurements shown on Exhibit D I started at the upper end of Branch A as Hiatt constructed it and went down to the main ditch.

Further cross-examination:

Branch B was a short Branch about two hundred fifty — long. The grade was an inch to the one hundred feet. Branch C for the 1st four hundred feet, one inch to the one hundred. It also outletted into the Hiatt ditch.

Exhibits E-1 and E-2 introduced in evidence.

Further redirect examination:

Have looked up on the dates as to the time the survey was made for A, B, and C; "A" April 10, 1911, the others ("B" and "C") on April 12, 1911.

S. F. MOELLER, for Plaintiffs, testified as follows:

Live at Rockwell City, Iowa. Am a drainage and civil engineer for about twenty years. Have had considerable experience
51 in laying out, surveying, and measuring ditches. Have taken contracts for constructing them. Associated with my brother John Moeller, of Knierim, Iowa, in the firm of Moeller

Brothers. Had occasion to examine and make surveys in what is called Drainage District No. 29, Pocahontas County, last fall. I supervised taking levels upon a main line about one thousand feet north of the south line of the SE¼ of Section 33, Pocahontas County, or the County line. From that point northeasterly along the main line to the junction with Branch A near the Chicago, Milwaukee & St. Paul railroad and then later on I personally took the levels on Branch A from its junction with the main line at the Chicago, Milwaukee & St. Paul railroad to the source of this Branch A, crossing parts of Sections 34, 27, and 26 in Pocahontas County. This was done in connection with the drainage investigation of the Big Cedar drain for Pocahontas-Calhoun and Sac Counties. I was employed by J. P. Moore of Rockwell City, engineer of the big cedar. At the time I took the levels I made two cross sectional measurements of Branch A in drainage district No. 29. I have made additional measurements this morning. Ed Rathbun of Fonda, Iowa, was with me this morning. When I first took the measurements our investigation at that time was to determine the drainage conditions in the lower part of this drainage district No. 29 as being tributary to the big cedar drain. We concluded from our investigation it would be advantageous to the district to deepen or lower the end of the main line and put a tile into Branch A, so as to convert it into a closed drain instead of leaving it open. Have made measurement of the ditch of Branch A of Drainage District No. 29 Pocahontas County, Iowa, and of that portion of
52 Branch A the first twenty-three hundred feet beginning at the junction of Branch A with the main line near the Chicago, Milwaukee & St. Paul track, thence going in a northeasterly direction across parts of Sections 34 and 27 to a point about two hundred fifty feet from the east line of Section 27.

Q. What was the total yardage you found from the figures, was in that portion of the Branch that you just measured as you testified?

Objected to by the Defendants as immaterial.

A. Five Thousand nine hundred ninety-four cubic yards.

This portion of Branch A drainage district No. 29 has not the appearance of having been washed out. It appears as though it might be a very little filling since it was constructed. In order to determine the station here we took levels and really surveyed the ditch and measured it besides. Those figures and Exhibit "F", two pages, are the results of our investigation and measurement. Top and bottom widths were measured this morning. Depth and cross sections Oct. 8, 1914, when I took the levels of top and bottom to determine the cuts or depths of the ditch.

Exhibit "F" offered in evidence.

My observation of this drain in comparison to other drains I have investigated I find the grade on this very light and those grades usually fill. I could not say exactly the grade but it is somewhere between three and four one-hundredths and some parts even less. Very flat.

53 Cross-examination:

E. C. Rathbun and myself made this set of measurements this morning on the ditch and got back to this hearing. In making these figures the top width and bottom width were the figures we took this morning. The cut are figures took in Oct., 1914.

Q. How do you know that these stations, for instance station four or five is where you took the bottom width and top width today corresponds exactly with the stations where you took the cuts last fall?

A. The stakes are still there.

ALEX PETERSON, on behalf of Plaintiffs, testified as follows:

I have land in drainage district No. 29 Section 16 in Pocahontas County, also in Sections four and nine. I do not get any tile or open ditch on my land from this drainage district. I don't know how far it is from my land to the open ditch. About one and one-half to two miles. We had an outlet there before anything was established. I do not remember the time when Branch B was put in. The open part of Branch B was put in before the cleanout on the main.

Redirect examination:

I did not know they were cleaning out this ditch and repairing it until we got our tax receipt. I didn't know the contract had been let to Mr. Hiatt. First learned of it from the tax receipt in the year 1913, in the spring.

54 G. M. TWEEDALE, on behalf of Plaintiffs, testifies as follows:

I own land in Section thirty-one on the north side of the Illinois Central between the Illinois Central and the public road. Branch B open ditch runs along the north side of my land. The cleanout did not extend to my land. The cleanout was about a mile below my land the way the ditch runs. I had tiled my land into the open ditch Branch B of 29 before the cleanout was had. My tile was about three feet deep at the outlet.

Cross-examination:

I have one hundred four acres and a fraction of land. I am one of the Plaintiffs in this case.

ED KORF, on behalf of the plaintiffs, testified as follows:

I own the S½ of the N W¼ of 20, and the E½ of the NE¼ and the SW¼ of the NE¼ of 20. Branch B extends through my land. It is all tiled. My land is one hundred twenty rods from the open ditch of Branch B. Before Branch B was in there was a twelve inch tile through my land. The tile was about two feet deep at the outlet.

We had the land on the S½ of the NW¼ of twenty tiled too. Branch C that comes up there is tiled. It empties into the open ditch on the SW¼ of nineteen over a mile from my land.

55 Redirect examination:

Q. Did you know anything about their cleaning or repairing the main in 29?

Objected to by the Defendants as irrelevant, incompetent, and immaterial, leading and suggestive.

A. No, sir.

Q. Ever know of their letting contract for same?

Same objection.

A. No, sir.

Cross-examination:

I owned the land all the time during the proceedings in this case. June 1, 1911, was the first I owned the land. I owned the land when the ditch was going through.

FRED DUITSMAN, on behalf of the Plaintiffs, testified as follows:

I own the SW¼ of Section 30 in Colfax Twp. The open ditch in drainage district No. 29 goes partly through my land. The main ditch goes right along the line on the west side. Branch B goes on the south side of the road. I remember the time the main ditch in 29 was cleaned out or deepened or dug out the second time. It came three-fourths mile below my land; stops on the Woods west line. The main ditch along my west line has never been cleaned out. My land was tiled before they cleaned out the main west of the Woods land. My outlet was about six feet deep. Some of my land drains into Branch B. Branch B was built at the time they
56 cleaned out the main. It furnished me a good outlet. Branch B along my line is an open ditch.

Cross-examination:

I outlet about half of my system of tiling in Branch B and about one-half in the main. My land was tiled before the cleanout. After the Branch was dug I tiled my land and after the main was dug I put in tile in the main. I cannot see any difference in the work of the tile or outlets before the main ditch was cleaned out and now. It does not work any better now than before. The filling in the open ditch before my land did not affect the drainage of my land.

C. F. LINNAN, on behalf of the Plaintiffs, testified as follows:

Own the E½ of Section 17 Colfax Twp. That is in drainage district 29. The open ditch nor any of the tile go across my land. I

had this land partly tiled out before drainage improvements in 29 were constructed. The south three eighties of the one-half section there was tile on them. They were not completely tiled. The S½ of the SE¼ of Section 17, is drained into tile Branch B, largely the S½ of the farm. That is the way I had it drained before.

WILLIAM BREIHOLZ, witness on behalf of Plaintiffs, testified as follows:

I own land in district 29 on Branch B. That Branch through my land is tiled. I have the north one hundred acres of the
57 SE¼ of Section 20 Colfax Twp. My land is right south of the Charles Korf land and southwest of the John Clancey land. Did not have any tile drains constructed on land before drainage improvement in 29 was made. My land is about two hundred fifty feet from the open part of Branch B. Do not remember the time when the main west of the Sarah Wood's land had been dug out again after first built. There is no open ditch on any of my land. Whatever I have I tiled. I am one of the Plaintiffs in this action.

Q. Mr. Breiholz, you say you knew nothing about their doing any extra work or cleaning out the main or branch A in district 29?

Objected to as incompetent, irrelevant and immaterial.

A. No, sir.

Q. When was your first knowledge of it?

Same objection.

A. When we got the tax receipt.

Cross-examination:

I got the tax receipt in the spring of the year two years ago when the first assessment went on the tax receipt. I knew the original ditch was established. There was a little double taxation on the other eighty. I did not take an appeal from the assessments. Appeared before the Board; asked them to reduce the assessment. They said it was too late. I knew about the building of this ditch in 29 the first time. I did not know that the ditch was filled up. Never paid any attention.

58 P. S. PEIFFER, on behalf of Plaintiffs, testified as follows:

I own the E½ of the NE¼ and the SE¼ of the SE¼ of Section 30, Colfax Township. The open ditch runs through my land, that is Branch B. I did not know that they were cleaning out or repairing the main or Branch A in drain 29. I think it was half through when I heard they were cleaning it out. Did not know anything about a contract let to Mr. Hiatt. Did not know of the assessment until I got the tax receipt in the spring of 1913. That is the first notice or knowledge I had. Did not have any of my land tiled until the ditch came in.

Cross-examination:

Knew of the original proceedings when this ditch was established. Knew there was a district being established including my land. I didn't know whether it was tiled or open. Rather would have had it tile. Appeared before the Board and they were discussing whether to make it tile or open ditch.

JOHN E. JORDAN, on behalf of the Plaintiffs, testified as follows:

Am the owner of the W½ of the SE¼ of Section 30 in Colfax Twp. in drainage district 29. A portion of the drain extends across the land. I think it is Branch B. That Branch there has never been repaired, deepened, or widened or cleaned out since constructed.

59 Did not know anything about the work they did on the main and Branch A in 20 in regard to cleaning and repairing. We heard contract was let to Mr. Hiatt but do not know when. Did not know when the assessment was made. Did not receive notice before the tax. Learned that the land was taxed when I got the tax receipt.

Cross-examination:

I knew what the original tax was when the first tax was put on for original construction. Filed objections and appeared before the Board of Supervisors once or twice during the course of the proceedings. I knew that Hiatt was cleaning out the ditch, the lower portion. There never was any cleanout on Branch B. Did not know the condition of the ditch before the cleanout as to whether that open ditch had been filled up or not. I heard that it was but never examined it. I am one of the Plaintiffs in this case.

GEORGE W. DAY, on behalf of the Plaintiffs, testified as follows:

My name is George W. Day. Formerly County Auditor of Pocahontas County. Since I have been County Auditor I have been deputy or official in charge of drainage matters or records in Pocahontas County. I have with me drainage records of Pocahontas County so far as that record embraces the proceedings of the Board of Supervisors and other officials of district No. 29. Also have the papers and records and files of the Auditor's office of Pocahontas County that pertain to that drainage district. The drainage record to which I refer is the drainage record which is marked on the back "Drainage Record No. 6, Pocahontas County."

Q. And in one part of that volume I find commencing
60 at page 240 the label attached to page 240, drainage improvement district No. 29. Are the proceedings to which you have just referred contained in the drainage records of the County Auditor's office, those contained in that volume commencing at page 240 and including 273?

A. Yes, sir.

Q. What papers Mr. Day are spread upon that drainage record?

A. I believe that all the papers except the construction reports of the engineer and engineer's estimates are spread upon that.

Q. I see. The book itself to which we have just referred is the one the reporter has marked "Exhibit "G" E R C". Mr. Day, it may not be necessary to offer the entire record, which is very lengthy and will be very extensive to set out in print in case of an appeal and transcript, but I want to ask you a few questions. You were County Auditor at the time of district No. 29 being originally petitioned for?

A. Yes, sir.

I have been familiar with the proceedings in that district from that time on. For the last seven years I have been employed and in charge of the drainage business in Pocahontas County. The first petition in drainage district No. 29 seems to be July 12, 1904. A number of others appear to follow dated later in the year 1904. On page two hundred fifty and subsequent pages the engineer's report being the preliminary survey by engineer Wheeler.

Q. I find in examining this drainage record, page 460, that the record itself recites the names of the persons filing objections
61 but does not appear to set out the objections that were in fact filed. Is this in accordance with your recollection?

A. I do not recollect now.

Q. I ask because you said with certain exceptions, all proceedings were in the Drainage Record. Then it may be true that there are matters actually filed that are not spread upon the record?

A. Yes, sir.

Q. Mr. Day, it appears the last proceedings in reference to this drainage district are dated about Nov. 14, 1914. Have any proceedings been had since not entered or spread on the record?

A. Why I don't recollect of any. I guess it isn't there. That is just as far as it was when it went to the Bond Company.

Q. Now Mr. Day, the work of Mr. Hiatt, contractor, under the last contract which he made and which I take it is one jointly in controversy so far as covered by progress certificates, is covered by this Exhibit "P"?

A. Yes, sir, I believe that covers it entirely.

"Exhibit P" is offered in evidence.

Mr. Kelleher: We offer in evidence from Drainage Record No. 6, which has been identified as Exhibit "G" in this case, the report of A. J. Wheeler, engineer, purporting to have been filed June 5, 1905, and appearing in said Drainage Record on Pages 250 to 258 inclusive, and which reports include the plans of improvement, recommendation of the engineer, and estimate of cost.

62 EXHIBIT "P",

is as follows:

Engineer's Estimate of Work Done upon Ditch No. 29. From July 1, to Aug. 23, 1911.

Pocahontas County, Iowa. S. F. Hiatt, Contractor.

Quantities-Cubic Yards Excavation.

Section	This estimate.	Previous estimate.	Total estimate.	Price.
2	6801	.....	6801	30c

Value of Estate.

This estimate.	Previous estimate.	Total estimate.
$2,040.30	.....	$2,040.30

Remarks.

For Cleaning Out from Sta. 417 Plus 50 to 500 Plus 55.

	This estimate.	Total estimate.
	$2,040.30	$2,040.30
Deduct 20%	408.06	Paid in Warrant No. 3038
Amount payable to contractor .	$1,632.24	

8-23-11.

W. B. WARRINGTON,
Engineer.

Engineer's Estimate of Work Done upon Ditch No. 29 from Aug. 23 to Dec. 16, 1911.

Pocahontas County, Iowa. Sam Hiatt, Contractor.

Quantities-Cubic Yards Excavation.

Section	This estimate.	Previous estimate.	Total estimate.	Price.
..	11,000	.....	11,000	28

Value of Estate.

This estimate.	Previous estimate.	Total estimate.
$3,080.00	.....	$3,080.00

63 Remarks.

For Cleaing Main Ditch. From Sta. 0 to 115 and Outlet in Calhoun.

	This estimate.
	$3,080.00
Deduct 20%	616.00
Amount payable to contractor ..	2,464.00

W. B. WARRINGTON,
Engineer.

Engineer's Estimate of Work Done upon Ditch No. 29 from Dec. 16, 1911, to Aug. 5, 1912.

Quantities-Cubic Yards Excavation.

Section	This estimate.	Previous estimate.	Total estimate.	Price.
..	19,349	.....	6,801	30c
..	.....	.....	11,000	28c
..	.....	.....	19,349	28c

Value of Estate.

This estimate.	Previous estimate.	Total estimate.
.....	.....	2,040.30
.....	.....	3,080.00
$5,417.72	.....	5,417.72

Remarks.

First estimate.
Second estimate.
Third estimate for completing cleanout.

	Total estimate.	This estimate.	Total estimate.
	37,150	$5,417.72	$10,538.02
Deduct 20%	.....	1,083.54	.....
Amount payable to contractor	.....	4,334.18	.....

W. B. WARRINGTON,
Engineer.

64 Q. Then can you point out to me which of the papers that are included in the whole bundle or package or file marked "H" is the final for that particular record?

A. The one dated August 5, 1912.

Q. And that is the last one in file Exhibit "H"?

A. Yes, sir.

Q. Now part of that report seems to be in ink and part in pencil. Is that in pencil in Mr. Warrington's handwriting?

A. I do not know. I do not know whether it is or not.

The report of August 5th, 1912, referred to as the last one on file, "Exhibit H", is as follows:

Pocahontas, Iowa, Aug. 5, 1912.

W. B. Warrington, Drainage Engineer.

To the Honorable Board of Supervisors of Pocahontas, Ia.

GENTLEMEN:

As engineer on Drainage District No. 29 I wish to report that the contractor "Mr. Sam Hiatt" has completed his contract for cleanout in Drainage District No. 29 to my satisfaction.

Respectfully,

W. B. WARRINGTON.

The following notation appears on said report in lead pencil:

Upper end of Main	6,801 Cu. Yds.	@ 30c.
Lower end of Main	26,750 Cu. Yds.	@ 28c.
Branch A	3,599 Cu. Yds.	@ 28c.

Q. Well Mr. Day, if these lead pencil figures following the signature of Mr. Warrington are not in his handwriting, are you able to verify them by reference to any other record or to determine whether the yardage computed for the various portions of the
65 work as set out in that memorandum are or are not correct? Put there another way? This pencil memorandum seems to classify into three classes in the yardage covered by the Hiatt work to wit: into the upper end of the main, lower end of the main and Branch A. Do you know whether that computation is correct or are you able to verify it from any other source?

A. Only way would be comparing with his estimate of what it was. If we could find that report he made of the proposed cleanout.

Q. Mr. Warrington did make some final report and filed in the Auditor's office covering the last Hiatt contract?

A. That is the report there.

Q. You mean this paper, August 5th, 1912?

A. Yes, sir.

Q. Isn't that a certificate rather than a report? A certificate showing the amount due?

A. No. That just states it is finally completed.

Q. Mr. Day, then it appears from conversation that has occurred between counsel and yourself that has not been taken of record that Warrington did at some time prior to the commencement of the work by Hiatt on the last contract, outline in a written report to the Board, the work to be done?

A. Yes, sir.

Q. That written report is not spread on the drainage record?

A. No, sir.

Q. And the written report itself, are you able to find it?
A. No, sir.
Q. You have searched for it?
66 A. Yes, many times.
Q. And Mr. Warrington, who made the report, is dead?
A. Yes.
Q. Do you know where his own personal records were preserved, if preserved?
A. I think they are——
Q. Who has them?
A. A. L. Thornton.
Warrington did not keep carbon copies. He just kept his field note book and made these reports from that field note book. If it is in existence A. L. Thornton has that book.
Q. We offer in evidence Exhibit "H," same being the file or package of papers heretofore identified and referred to. Mr. Day would you also indicate under what date appears the final estimate or certificate for the first contract of Hiatt in that Exhibit "H"? The paper you have pointed out as being the final estimate on the first contract of Hiatt is one under date of Nov. 2, 1909?
A. Yes, sir.

The paper under date of Nov. 2, 1909, part of the exhibit "H" is as follows:

W. B. Warrington, Drainage Engineer.

Pocahontas, Iowa, November 2, 1909.

To the Honorable Board of Supervisors of Pocahontas County, Iowa.

As engineer on Drainage District No. 29 I wish to report that Section No. 7, has been completed to my satisfacaion by the
67 contractor Mr. Sam Hiatt. And I would recommend that you accept the said section and settle with Mr. Hiatt for 3829 cubic yards.
Respectfully,

W. B. WARRINGTON.

No. 3878.
Exhibit 11 I.
Taft.

Q. Which is the result of the original construction of that part of the Improvement known as Branch A?
A. Yes. The Hiatt contract of Branch A.
Q. That would be the open work in Branch A, I take it?
A. Part of the open work on Branch A.
Exhibit "Q" includes the entire set of profiles for the Improvement as it was finally planned by the engineer, Warrington, and upon which the original contracts were let for the construction of said Improvement. Exhibit R is the original plat. Mr. Warrington did not make a profile at the time of the last letting to Sam F. Hiatt of the contract for what is called the cleanout. There is no profile showing any changes. At the time Mr. Warrington filed this missing report he did not file a profile. I do not know whether there

was any engineer who was associated with Mr. Warrington in that work at that time—I mean making cross sections and surveys--An assistant rodman or anything of that kind. Mr. Thornton may have.

Q. Mr. Day, the assessment which was levied or spread for the last Hiatt contract was spread without giving any notice of any kind to the property owners?

A. I think so.

Q. And the contract Mr. Hiatt had was not let upon advertising for bids?

(Defendants objected as immaterial.)

68 A. I do not recollect. We received bids.

Q. Was there any advertising?

A. I do not recollect the advertising.

Q. You do not recollect whether there was advertising or not?

A. No. But we had other bids.

Q. That was not what I asked. Was it advertised?

A. I do not recollect. I don't think it was.

It is stipulated between the parties that preliminary to the contract made with S. F. Hiatt for the past work, called in the records, "The cleanout," there was no advertising in the newspapers or publication or notice published of the letting of the work.

Cross-examination:

There was no notice published of an extra assessment, outside of the minutes of the Board of Supervisors. As part of the Exhibit "H" which has reference to Banch A of Drainage District No. 29, is the following report under date of Nov. 11, 1910; also report of engineer Warrington, under date of June 12, 1913.

Pocahontas, Iowa, Nov. 11, 1910.

To the Honorable Board of Supervisors of Pocahontas County, Iowa:

GENTLEMEN:

The main ditch in Drainage District No. 29 between Station 0 and 85 has filled to such an extent as to cause Branch A to fill, and I would recommend that you have them cleaned.

I think that Branch A should be cleaned from Station 0 to Station 23. And that the Main ditch should be cleaned from

69 Sta. 0 to Sta. 90. There will be about 500 cubic yards in Branch A and about 5000 cubic yards in the Main.

Respectfully,

W. B. WARRINGTON.

W. B. Warrington, Drainage Engineer.

Pocahontas, Iowa, June 12, 1913.

To the Honorable Board of Supervisors of Pocahontas County, Iowa.

GENTLEMEN:

As engineer on Drainage District No. 29 I wish to report that the open ditch on Branch No. A has filled some between Stations 46 and 52. And I would recommend that you have it cleaned. It is only filled about 1½ feet but the land laying North East of this point has a poor outlet on account of this fill.

Station 46 is just north of the steel highway bridge which is on the ¼ line Road in Section 26-90-34 and Sta. 52 is at or near an 8" tile outlet about 600 feet North of the bridge.

Also the Illinois Central Railway Co. have riprap-ed the sides of this same ditch where it crosses their tracks at Bridge No. W 409-25, and have encroached on the ditch to such an extent that there is a 26" waterway where there should be a 5 foot waterway. This rip-rap-ing should be changed sufficient to make a 5 foot waterway.

Respectfully,

W. D. WARRINGTON.

Exhibits "I" to "R" inclusive offered in evidence.

Recalled:

I have with me the drainage assessment record of this
70 County. The original assessment as confirmed and levied by the Board of Supervisors in District 29 is found on pages 170, 185, inclusive. In cases of appeals having been prosecuted from assessments as originally levied, the amount that the Court fixed is indicated by entries in this book. This book that I have with me is known as "Drainage Assessment Records No. 1."

Q. Will you explain Mr. Day, in what manner the assessment now in controversy in this case appears in the pages to which your attention has been called?

A. This column marked "Amount of 1912 tax list" would be the amount placed on tax list to be collected during 1913.

Q. That represents the relevy involved in this action, does it?

A. That represents the relevy and interest.

Q. Will you explain a little in what way the figures appear any where on this record if they do otherwise than inserted in that column under the head of amount of 1912 tax list? Do they appear elsewhere as a levy confirmed by the Board?

A. This is the amount. There was the Auditor's office figures to place on regular tax list that they turn over to Treasurer to collect.

Q. Is there not spread in your drainage record itself a tabulated statement of the levy for the reassessment or additional assessment?

A. No, sir.

Q. Turn to your records. Begin with what the Supervisors did as recorded in the Minute Book entitled "Supervisors' Minute Book

Number 6." On pages 527 and 528 appear certain minutes in respect to levy for special and drainage taxes for the year, 1912.

71 And now is that the only record of the action of the Board in respect to the levy in controversy in this case?

A. Yes, sir.

Q. We offer in evidence from said minute book Number 6 from pages 527 and 528 thereof, the proceedings of the Board of Supervisors in respect to what is called special and drainage taxes for the year 1912 which so far as it applies to matters in controversy in this case is as follows: "In the matter of making the levy and special and drainage taxes for the year 1912, same having been adjourned to this date, on motion the following drainage levy *were* made and ordered spread on the tax lists for the year 1912 in the ratio as original assessments were made and confirmed * * * in Drainage District No. 29, $682 to pay interest on bonds and $11,500 to pay outstanding indebtedness * * *

It is further ordered by the Board of Supervisors that all special taxes are hereby levied against the property designated when certified to the County Auditor by the proper authorities and the making of the order for further drainage levies is on motion adjourned until December 19, 1912"; the proceedings appearing under date of Wednesday, December 4, 1912.

Q. Mr. Day, now the Auditor's office is shown by the record and to which we referred a moment ago, by drainage assessment record No. 1, thereupon carried into the column which has been indicated and which is headed "amount of 1912 tax list" certain figures and items intended to apply to each of the forty acre tracts in the district 29?

A. That is the intention.

I did not do the figuring personally. I cannot tell who did it. Do not know what factor was used in determining what sums

72 would be inserted in that column. Do not know what rate of interest was computed for the bonds. Have not had my attention called to the fact that the bonds appear to have been figured at 6%. In fact I believe they draw 5½%. We have no record in the Auditor's office which shows the condition of the funds in drainage district 29 in Dec., 1912. Those we obtained from the Treasurer. The amount of the outstanding indebtedness and also the amount on hand at the end of the year we can tell. In the Auditor's ledger there would be the balance on hand. On Dec. 31, 1912, there was a balance on hand of $1,195.45. The district had that sum in its funds. That is cash on hand. There was outstanding warrants. The record does not show what warrants were outstanding. We would go to the Treasurer's office and find his register of warrants and that would show it.

Q. Do you know of any person who did make a calculation? A member of the Board of Supervisors or any one else at the time this action was taken by the Board in Dec. 1912?

A. Why Mr. Terry, Auditor then, and I think Mr. Forbes, were the ones who made the figures.

Q. At that time of course the 1780 odd dollars had been paid to the Katz-Craig Company and had depleted the funds of the district to that extent?

A. I do not know whether that had been paid or not. The warrant had been issued for that.

Q. That warrant was paid years ago? Wasn't it?

A. I do not know when.

Q. Do you know what the totals appearing in this column in the assessment records are compared with the $11,500 and interest on drainage bond? Does it figure the same amount or do you know?

73 A. I do not know, I am sure.

Q. Will you turn to the footings of the columns "amount on 1912 tax list" and tell us the footings as to the total?

A. The footings show $12,634.03.

All the bonds were issued in that district at that time. $23,400 of the authorized issue. $11,000 were not delivered at that time. That would leave $12,400 of delivered and outstanding bonds drawing interest. Undelivered bonds of $11,000 were not drawing interest. The assessments were drawing interest. And were actually $12,400 delivered bonds drawing interest in Dec. 1912, when this resolution was adopted. Interest at the rate of 5½%. The Katz-Craig overpayment, or alleged overpayment, of $1,780 odd dollars was included in the $2,675.83 warrant, that had been paid April 30, 1912, before this December levy was made. This drainage assessment record which has been offered in evidence shows what the original assessments were outstanding and unpaid by property owners as well as the amounts of the various assessments. I have examined to ascertain whether or not the contractor, Hiatt, a party to this case gave any bond to secure this contract, on the reclean. He did give a bond. It is in the vault.

Cross-examination:

Q. At the time the Board made its levy at district 29, being in December, 1912, what was the amount that should have been levied or was necessary to be levied in order to pay interest upon the bonds for the ensuing year?

74 A. The amount that should have been placed against each tract of land in which the assessment had been unpaid would have been interest at 6% from the date of the levy by the Board. I believe November 28, 1911, up to January 1, 1912, and then at the rate of 5½% from January 1, 1912, to January 1, 1913, which would have made about 12%—a trifle over 12.

Plaintiffs object to above because not responsive to the question and the objection is to the substance of the answer. That it states a mere conclusion and opinion of the witness and invades the province of the court; passed upon a question of law and is incompetent question in calling for the amount of bonds only and for that reason we did not object.

Q. I will ask it this way in order to make the record a little more secure. In view of the objection at the time of the levy of the Board in 1912, what sum, if any, was due upon the dollar of unpaid taxes when an owner had failed to pay his taxes and interest on bonds

and what sum on the dollar would be due or was due upon each dollar of unpaid taxes and interest on bonds? Limiting your answer simply to such interest as was then due or would fall due before the next time for levying upon bonds should arrive?.

Objected to by the Plaintiffs as calling for mere opinion and conclusion of the witness. Not calling for any facts and incompetent and invading the province of the Court.

A. 12%.

Q. Why do you say that? Upon what ground do you so state?

A. The assessment would be confirmed by the Board on November 28, 1911, drawing interest at 6% from that date up to the time the bonds were issued and from that date draws the same rate that
75 the bonds do from November 28 to January 1, 1913, would amount to 6½%, and January 1, 1913, next payment due, would be 5½%.

Q. Is that the manner of collecting interest when levying interest in the auditor's office?

Same objection by Plaintiffs.

A. Yes, sir.

Q. Is that the manner in which other interest levies were made on other men in this district other than the Plaintiffs in this case in case there were any who had not paid their interest installments?

A. Couldn't say. Never figured those.

... the interest on the bonds fell due during the year 1913, it should be collected in the year 1912 with the 1912 taxes so as to have it on hand to pay interest in 1913. At the time the Board made the levy in the fall of 1912 of the $11,500 there were outstanding contracts which had not been fulfilled which would be due and payable. There were engineers, claims for damages, and, I believe, some incompleted contracts—that is my recollection.

Further cross-examination:

I believe B. L. Allen's damage claim was unpaid. This claim in the amount of $550 was allowed after the time of the entry of the Board in December. I couldn't give you now a list of the claims I thought outstanding December 4, 1912.

Recalled:

In making my calculation of interest I figured one year too much
76 at 6%. It should be about two months at 6% and two years at 5½%. The bonds draw interest from January 1, 1912. The assessment was made November 8, 1911.

Further direct examination:

There was due on December 1, 1914, or about that month, 12% on the dollar of each dollar of unpaid original assessment in the district.

Redirect examination:

There would be just 11% due on the bonds.

Q. I see by this resolution to which you have referred, adopted by the Board, March 22, 1912, that there were unpaid assessments in the amount of $23,422.60, including the township road assessments. Is that according to your recollection?

A. I do not recollect for sure. They sometimes included those and sometimes didn't.

The road assessments in the district amounted to $3,752. I do not know whether it could be figured out at this time what amount was owing by the drainage district. The amount of warrants which had then been issued to Mr. Hiatt were included in that indebtedness.

Further cross-examination:

The Katz-Craig payment was made in April, 1912. The funds of the district have been depleted that much. This overpayment was discovered in the suit of B. F. Allen against the drainage district.

77 Further redirect examination:

The officials themselves made the overpayment and they discovered what they had done when the matter was revealed in the Allen suit.

J. W. CLANCEY, one of the Plaintiffs, testified as follows:

I own two hundred forty acres in Drainage District No. 29. My land is served by Branch B. It is partly open work and partly tile. The open work does not extend to my property. I am a drainage contractor. Am a member of the firm of Linnan and Clancey. The firm have a contract for some work in the drainage district. We had open work on Branch A. We had from Station 23 to I think it was 85. This was straight ditch work. We done it with teams.

Q. Where was the work you contracted to perform or the firm contracted to perform in Branch A, with reference to the part of Branch A that one Hiatt subsequently had under contract?

A. Well, we started off where he had it finished up to station twenty-three.

Q. His work then was on the line of drain below your work?

A. Yes.

We did the open work on A in the fall of 1910 or the early part of 1911. Hiatt had the original contract for the part of Branch A that was below the work we done. He also had the second contract for the same work. With reference to the time we did the work on the upper part of Branch A, it was a couple of years before
78 that he did the work under his first contract. He was not working on the so-called cleanout on this Branch A when we were working on this upper portion. He did that work subsequent to the completion of our part of the open work. I have seen the work Hiatt did under the so-called cleanout. I saw the work that was done under his first contract on Branch A. I know about the width that we started and about the width his ditch was when we hooked

onto it. The top of our ditch was about twenty-four feet and I should judge the ditch we hooked onto that he made was about six or eight feet narrower. I wouldn't say there was a great deal of difference in the bottom of the ditches only that we were considerably deeper. Our work began at station 23. Our work is two feet deeper than that below station 23. I observed that portion of the Hiatt work from station 23 to the highway somewhere around eight or nine hundred feet. I have been a drainage contractor four years or more. The original part of the Hiatt work was done with scrapers. The side slopes of the work we did on Branch A was very near the same as Hiatt's. I saw the work that was done by Hiatt under the so-called cleanout contract.

Q. What opportunity did you have to see it? I mean what occasion did you have to see it?

A. Well, I passed it several times and walked over it several times.

Q. How was that work done? With scrapers and machines, or how?

A. Well, it was done some with machine and some with team.

Q. What difference, if any, was made in the work as it had originally been done by Hiatt and as it was done under his second contract as to whether it was any deeper, wider, and if so, to what extent?

79 A. Well, I could not say—just how much deeper—but would say that it was a good one-third to one-half wider than it was.

Q. Was the depth increased to the same depth as your ditch or not?

A. Yes, sir. It was put down on the same depth as ours.

Q. How much did you say yours was deeper than the old one?

A. I said two feet deeper.

Cross-examination:

In saying this I refer only to the Hiatt cleanout on Branch A. When we finished our ditch, our ditch was two feet lower than Hiatt's ditch was. Compared in depth to the original Hiatt ditch, ours was deeper. In places the Hiatt portion of Branch A, as originally constructed, had filled up. In my judgment cleanout was really necessary for the best interests of Branch A. Our work was done by reason of being a contractor for a portion of this ditch under re-establishment. I was one of the petitioners urging the Board to increase and rebuild it. Branch A up to station 23 plus, being the Hiatt part of Branch "A", had been completed at the time we petitioned the Board for the ditch to be enlarged.

Redirect examination:

Q. Now when you say that your ditch, a portion of Branch A, you built as contractor, was two feet lower than the work originally done by Hiatt, do you mean two feet lower than the work was

80 originally finished by him or two feet lower than it was after filled?

A. I mean the original.

Q. Two feet lower than the original work he did?
A. Yes, sir, that is what I mean.
Q. That is independent of any filling in his work?
A. Yes.
Q. Do you mean the increase in width from the one-third to one-half was an increase over the original width?
A. Yes.
The part of Branch A, Hiatt originally built was done by him before certain changes in the plan of the ditch.

Cross-examination:

I had no notice of any special assessment or of any additional assessment except the first assessment that was made for original construction.

S. F. HIATT, being sworn, testified as follows:

Am the gentleman who had two different contracts with the Board of Supervisors of Pocahontas County with reference to drainage district No. 29. The first of those contracts I think was made in 1909. Under that contract I began that work about the 1st of June and completed it about the first of October. I began the work under the second contract on or about the 20th of June, 1911, and finished about the 20th of July, 1912. Mr. Warrington was the engineer in charge of the construction on both contracts. I was personally in charge of the work and was on the ground most of the
81 time. The work under both contracts was open work. Under the first contract I built part of Branch A from about station 23 toward the outlet, 23 stations. Under the second contract I did some work on Branch A and some on the main. Part on the upper end and part on the lower end of the main. The second contract was divided into three locations. I did work at the outlet with scrapers. The work on Branch A under the second contract was principally with the machine. The lower part of the main exclusive of the outlet, on the second contract, I did with scrapers. I was furnished with cuts of the work by the engineer of the work to be done. I do not know where they are. I tacked them on the machine until we were by the stations and then we pasted on new ones. I never kept any track of them. I did not check the engineer's figures over. Do not know whether I was allowed enough or not. The bottom width of Branch A under the first contract I think was about four feet. Do not recall what the average depth of the cut was. Under the second contract stakes were set up by the engineer for the work, grade stakes. I did the work in accordance with those stakes with the exception of the slope.
Q. What do you mean?
A. The work I did with the teams was outside of the stakes. The engineer had nothing to do with it. That was done by myself and Dooley.
Q. By Dooley? Do you mean a member of the Board?
A. Yes.

Q. What did Dooley do?

A. The ditch was dug with the machine a little too straight up and down to suit me and he wanted to know if I would slope
82 it, and I did a little with the scraper.

I cannot recollect what was the bottom width of the work under the second contract. I could not say how much deeper we dug at the second time than the first. We dug deeper than the original grade. We probably went a foot below grade line. We followed the grade line of the engineer and kept all the fall we could. Did not have the profile for the second work. Had the cuts. Did not preserve the cuts. Have not my money yet. Do not have an office. Keep my papers at home. Tacked all cuts I ever had on the machine and leave them there. I cannot answer exactly the total amount of yardage removed under the second contract. It was something like seven thousand yards at the upper end, 26,750 cubic yards in the lower end. Something like 3,599 cubic yards on Branch A. There were twenty-three stations in Branch A which comprise the second contract. That was the same area that was covered by the first contract. There was three thousand yards or thereabout required to be taken out on Branch A on the first contract. The first twenty-three stations of Branch A were filled in some places when I did the work under the second contract. It was filled along to some extent. Could not say to what extent. Had to use dynamite on the second contract. The earth that we used dynamite on was not mere silt but was solid. That was caused by the fact that we were going to lower the grade line. This 3,599 yards removed under the second contract included this earth removed with dynamite. I cannot say how many yards of earth were moved for the first time under the second contract. I do not know what the second specifications called for. Did not see them. The cuts were all I had. I used dynamite on the main line in
83 one place. That was on the Mercer land east of the Dillsworth slough.

Q. For what extent of space did you use dynamite there?

A. Pretty hard to say—probably fifty feet.

I probably removed three hundred yards of earth at the outlet. I did not see the engineer measure it. He never had anything to do with it. I did not measure it myself. I never saw any person measure. I did not know to this day what the measurements were. I had a contract on 29 in Pocahontas County. It required me to make different changes in the ditch. I got my directions for changes from the engineer in charge and the Board of Supervisors. The engineer in charge was Mr. Warrington. His assistant was Mr. Lucius Thornton. The members of the Board who gave me directions were Mr. Dooley, Mr. Lieb, and Mr. Hopkins. Warrington was on the work probably once a month. Sometimes oftener. I cannot remember whether I followed the survey used by Mr. Warrington for the completion of the work. He gave me the figures as I went along. I put them on the machine. I do not know what the figures are. Have no book with them in. If the County Auditor should lose any of his records I would not know how to find out what work I had done.

Q. How many yards do you estimate of silt was actually in those 23 stations of Branch A at the time you went into the second contract?

Objected to by the Defendants as incompetent, irrelevant, and immaterial.

A. I cannot answer that on account I haven't the figures.

84 Q. Did it average a foot of silt from 0 to 23 in your opinion?

A. It averaged, I think, more than a foot.

J. A. MOELLER, witness on the part of Plaintiffs, testified as follows:

Live in Calhoun County. Am a drainage contractor and engineer. Twenty years experience as an engineer, and as a drainage contractor twenty-five years, both private and public. I am somewhat familiar with Drainage District 29 in Pocahontas County. I recollect the time that the contract was let to Hiatt by the Board for the so-called cleanout, I walked along the banks of the ditch for the purpose of bidding before the contract was let. I talked to the Board of Supervisors in their office at Pocahontas. Asked them in regard to whether they had any cleanout work. I think we had a drainage ditch letting and I asked them if they had any cleanout work. They said they had and would let me know when they got ready to clean it. That was some time in the summer. I went over that some time in the spring when I was in Fonda, but when I talked to them I couldn't say whether it was in the middle or fore part of the summer because I was up there several times to lettings both in the spring and summer. The reasonable value of that kind of work such as I saw along the ditches in drainage district No. 29 of removing the silt and reexcavating them to the original grade line, as that ditch was in the early summer of 1911, both on the branch and the main line, would be from 20, 22, and 25c per cu. yd. In my talk with the Board they didn't set any price. They said they would advertise it. I have done some cleanout

85 work. Built ditches in Pocahontas, Calhoun, Webster, Wright, Kossuth, Emmet, Marshall, and Story Counties. I have been over branch A since the work was done, last fall when the levels were taken. Doing work on the big Cedar drainage district. We didn't run the levels any further north on Branch A than the Illinois Central Railroad.

Q. Can you tell us what the cross section of the ditch for 23 stations below the Illinois Central known as branch A is?

Defendants object as irrelevant, incompetent, and immaterial, leading and suggestive.

A. I measured it. I forget what. I haven't any book, could not say just what width—different widths. From eighteen feet I think some places. Some places about twenty-three or twenty-four feet, but it seemed to be all widths. Of course some places caves out or sloped off.

Q. Do not know the bottom width?

Defendants make same objection.

A. I think it was from six to eight feet nine, one place. That was on top of the silt in there now.

Q. Do you know how much silt is in there now about?

A. Well, I don't. Some places comes about one-half way up on the tile. Could not say just how much. Other places just about to the bottom.

I was over that before the cleanout. I could not tell how the ditch compared in size and dimension, cross section as originally built and as it was after Mr. Hiatt did his second work. Noticed it was wider on account of where it crossed through under the bridge above the Milwaukee below the wagon bridge there but I could not say just how many feet.

86 Cross-examination:

I could not say exactly when it was I was at the courthouse when the Board told me they would advertise this letting or let me know. It was in the summer or spring I should judge about four years ago. That would be in 1911. I was at the courthouse at a tile letting job. I was bidding on the job. The members of the Board who were there, I think, Dooley, Lieb, Chris Nolan, I think McEwen, don't know who else. I know Hopkins wasn't there. I think it was Oleson. Had this talk after dinner in the Auditor's office. I have bid on many ditches in Pocahontas County. I got one. That was an open ditch. Am having trouble with the Board of Supervisors about getting my rights. As a matter of fact when I bid on any contract to any Board of Supervisors, I put specific clauses in the bid. In the contract that I finally did get in Pocahontas County or in which Pocahontas County was interested, various parties have filed bills and claimed liens, with the County Auditor. I have appeared before the County Board of Supervisors in Pocahontas County to file specific bids, fifteen or twenty times. I would have done the same in this case. If there was any specifications, I would have told them. I would have written the bid myself. I have surveyed last fall the main line of drainage district No. 29 where Hiatt made his cleanout. I ran the levels over it; took cross sections in several places. I know the contractors generally who do cleanout work in Pocahontas County. I know Mutti Brothers and Mr. Hiatt. I know contractors who did cleanout work in surrounding counties. George L. Meachain at Clarion, Chris Haiysted, Nevada, Iowa. Do cleanout work myself. We dug an old ditch in Marshall
87 County, one in Story County and dug some in Wright County. In Marshall County in 1908. It was part new and part old. Took out about thirteen or fourteen thousand yards. The ditch was one and one-half miles long. We got 25c per yard for new work and out of the bottom of the old ditch. In this work on 29 I figured we would not have to tear down the machine. We would start at the lower end of Branch A. Would go up the main ditch to Branch A then would take Branch A up to the Illinois Central then have to move the machine across country. I did

cleanout work for Emmet county; it was on, I think, ditch 64. The yardage in that cleanout was about four or five thousand yards. We dug about three-fourths of a mile in Wright County. The main ditch was I think about th-rty-nine thousand yards—Seventeen thousand yards came out of an old ditch. The rest was a new construction. We dug that I think, in 1911, with a dredge line. I got 945 for it.

Redirect examination.

Horton and Mosley got 14.85c per cubic yard for their work. We got for Calhoun County cleanout 18c.

J. L. PARSONS, on behalf of Plaintiffs, testified as follows:

Am a civil engineer. Formerly the engineer located at Humboldt. Have had ten years experience. Have had college training at Cornell College, Mount Vernon, Iowa. Am the same Parsons who once was appointed as engineer on a commission to assess land in Improvement District No. 29, Pocahontas County,
88 Iowa. Am the same Parsons who filed a report on said assessment. Exhibit "B" is the original report which my commission made. We went carefully over that district. Examined all the land in the district, including the various Plaintiffs'. I have figures showing the cost of the cleanout work.

Q. And have you in the light of your knowledge of that district and the land therein, conditions existing there, gone over the matter for the purpose of arriving at a conclusion as to what would be an equitable basis for the distribution of the cost of that cleanout to be apportioned and to be distributed in proportion?

A. Yes sir.

Q. Have you made that in the form of a tabulated statement?

A. Why, I have it roughly in pencil. Yes, sir. Not in very good shape.

Q. You say roughly. Is it set out in tabulated form?

A. Yes, sir.

Q. In order to complete that so it would readily be understandable, did you desire to copy it?

A. It would be a little more neat and legible, to say the least.

Q. With the consent of counsel, Mr. Parsons may file typewritten statement of his conclusions as embraced in this report.

Mr. Gilchrest: Subject to the right to object as incompetent, irrelevant, and immaterial and that it is not material to any issue joined in the case.

I have had about seven years experience making assessments in at least fifty or sixty drainage districts. The cost of the entire improvement varying from $500 to eighty or ninety thousand dollars.
89 Those ditches included some in which there were branches and laterals in addition to the main drains and open work and tile in the same district. The so-called Skeels assessment in 29, which was made after my assessment, was a blanket assessment, as we called it. Did not subdivide into areas to be served by the various

branches and laterals but spread the assessment entirely over the district without such division.

Q. What do you say as to whether in your experience there have been in the last 7, 8 or 10 years such assessments spread in districts in which improvements were constructed that embraced any laterals and branches?

A. Earlier assessments by most engineers were made that way, but up to date engineers, all to my knowledge filed reports showing the amounts that each tract of land in the district should pay toward the main drain and then to each branch separately. Everything is shown in an itemized statement of that kind.

Q. When reports are made in the manner you say they are ordinarily now made, is the land which is served by a lateral assessed then, separately, for the benefits from the main drain and for the lateral itself?

A. Yes, sir.

Q. And in such cases, I assume that reassessments are spread likewise; that is, reassessments for benefits to a lateral or spread against that lateral.

Defendants object as incompetent, irrelevant and immaterial.

A. I never have made reassessment—cannot say what I have done as I haven't, but would do it that way if called upon.

90 Same objection as last urged and also further that it is purely voluntary observation on the part of the witness as to what he might do.

Q. Basing your answer on your knowledge and experience as an engineer why would you regard that as an equitable method?

Same objection and further that the evidence is incomplete as the statute of the State prescribes the method in which new assessments should be made.

A. Why, I would use that method simply because it is just, in my opinion, and for this reason: Well, we will assume now, that a ditch is dug, no laterals constructed, assessments for main ditch are spread, some of the outlying lands might be assessed on an equitable basis, ten, twenty, thirty, or forty dollars to the forty, and receive all the assessments due according to the benefit. Then take the same district, and construct laterals up through some of the side lines, and they might be benefited ten thousand dollars, to the extent of ten or twelve hundred dollars to the 40, sometimes more, and then their assessment on one forty, instead of fifty, might be ten hundred and fifty dollars. We clean out the ditch: If the lateral had not been assessed, we would prorate it, and his share of the cleanout might be twenty dollars or forty per cent, possibly $50, whereas, if you include the cost of the lateral in with the cost of the main, and assess on that to raise the cost of repairing, he might pay, say 20% of his ten hundred and fifty dollars, or two or three hundred dollars, whatever it is. He certainly is not benefited more by cleaning out than

by the main, and by this you would assess this outlying forty and are doing it in this case, sometimes three or four hundred times the original ditch.

91 (Defendants move to strike out each and every observation, conclusion and statement of the witness in last answer, for the reasons urged before, and that it is not justice, and because, while Mr. Parsons is a fine gentleman, he is swearing as to the ultimate question which the Court, itself, must determine, and not Mr. Parsons.)

Q. Mr. Parsons, in computing the proportion of the assessments of the drainage in controversy, have you taken into consideration the question of what benefit those lands would get from the cleanout?
A. Yes, sir.

(Defendants interpose same objection.)

Q. In making that computation, did you have in mind the situation as you found it when you made the assessment, that is, elevation of land and relation of one tract to another in the district?
A. Yes, sir.

(Defendants interpose same objection.)

Q. The pencil memorandum you have produced is one which is now marked by the reporter as Exhibit W?
A. Yes, sir.

Q. We now offer in evidence Exhibit W, and with the consent of all parties, it is understood that Mr. Parsons may withdraw this and file a more complete copy, together with this memorandum, a more complete statement of the computations that are included within it.
Mr. Gilchrest: All right, with the statement that if desired, we will arrange for further cross-examination, subject to the stipulation on which defendants object to same as incompetent, irrelevant, and immaterial.

92 Cross-examination:

Q. This exhibit was made at a time when certain changes and enlargement in this district were probably contemplated but no definite action was taken.
Q. Then this Exhibit V is based upon an improvement and upon improvements in drainage district No. 29 which were never constructed?
A. The report, if I may amplify my answer, was the amount assessed for each 40 on the main open ditch. The changes made affected open ditch to a limited extent only and the only change made on the open ditch was at the upper end, where a small section was changed from ditch to tile, which change, if I were to reassess, would not affect the assessment on any of the land affected in this case.
I had field notes in addition to Exhibit V at the time we were making assessments. This Exhibit V does not attempt to classify lands

into low, wet, high or dry lands. We filed field sheets showing the classification and they are part of the records of Pocahontas County. I have investigated to know how much was assessed for branch A in this Drainage District on the cleanout. According to the figures I have, the yardage was 3599 yds. I did not figure how much Branch A has paid to this cleanout. I have field notes showing how much land was assessed as tributary to Branch A and Branch B. In some cases it is true, under the Skeels assessment tile branches had not paid for themselves.

Q. As part of the cross-examination, we would like to inquire of the witness as to what the other lands in the district would be assessed for on this cleanout job? I think it would be a good
93 opportunity therefore when making his statement which he is to make, we would like to have him show what he thinks the other lands should be assessed for cleanout as are the lands of his own clients?

A. Could I make a suggestion?

Q. Yes.

A. I could make a general statement that it would be 41.4% of the assessments shown in my original report for each 40 toward the open ditch.

Q. Then as I understand it, in order to make up your statement under this Exhibit W, you took just 41.4% of the assessments for the main which are shown by Exhibit V?

A. Yes, sir.

Q. Why did you take 41.4?

A. Because it took that proportion of the amount for the amount we assessed for the original open ditch to raise the money required for the cleanout.

Q. You would assess that same amount upon other parties who had tile?

A. 41.4%.

I took into consideration all other factors in arriving at the original. You must divide the job into units of some kind to assess, the main a unit, and each branch a unit. As to how much Branch A paid for the building of the main, if Branch A is a unit, depends on the lay of the land. Would have to go through the record and add together the amounts in Branch B and Branch A to determine what they should pay.

Redirect examination:

In my original assessment we divided the district into
94 units. Each area served by a particular Branch, treated as a separate unit. The entire area in the district was included in the unit served by the main. The big trouble with the Skeels assessment was that he didn't do that, and one of the big troubles with the reassessment is that it attempts to spread it in accordance with the Skeels assessment.

Further cross-examination:

I could know, or readily find out, by looking at the Skeels assessment that in my judgment it was a wrong assessment. Anyone who cared to file objections to the Skeels assessment could do it and could readily see wherein it was defective and they could readily have brought that matter to the attention of the Board of Supervisors at the time the assessment was before the Board.

(Exhibit W, as testified to by the witness Parsons, cannot be found among the exhibits as filed in this case.)

JOHN FORBES, testified on behalf of Plaintiffs, as follows:

Have been County Treasurer of Pocahontas County several years. The Plaintiffs in this case made a tender to me, I made a memorandum of the amounts.

Q. Mr. Forbes, will you just state the exact amounts and date of the tender by the Plaintiffs in this case, to you; of money for the purpose of paying for the interest on the outstanding bonds or assessments of said Plaintiffs on the land in controversy?

A. Amounts were tendered December 1, 1913. J. W. Clancey $207.37; Ed Korf $100.25; William Breiholz
95 $114.16; Mary Dooley $37.95; Charles Linnan $147.93; John Jordan $108.43; Alex Peterson $124.56.

The tender was made to me in cash. I was at that time County Treasurer of Pocahontas County. I did not accept the tender.

Q. As a matter of fact, so far as your records show, did they indicate what amount of the tax list for the current year, was for interest on bonds and what amount was for an additional assessment?

A. Didn't show the separate amount—the tax list did not show the separate amount.

Q. The tax list had extended for each 40 acre tract, a lump sum that included both the interest on the bonds and assessments that had been spread to be collected that year did it not?

A. Showed the total for the amount opposite that name and did not set it out separately for forties.

Q. Not on your tax list?

A. No.

Q. The amount owned by each individual land owner was extended in a lump sum?

A. Yes.

Q. And that would include every 40 he owned in that section and whatever was placed on the tax list for interest on bonds, and whatever for additional assessment or otherwise?

A. Yes, sir, that is right.

Cross-examination:

Mr. Lynch and Mr. Schneiders made this tender to me. I do not remember exactly what was said. I made a memorandum of what

was supposed to be the facts. They did not tell me in writing.

96 Q. Did you have any way of separating the amount due from these gentlemen for interest on bonds and amount that showed against their land on the books?

A. I did not.

Q. Did you have any way of determining how much these gentlemen should pay for interest on bonds and how much they should pay for something else?

A. I didn't have that in the books.

Redirect examination:

Q. Mr. Forbes, can you tell from these records whether there were any outstanding unpaid warrants which had been issued on district 29 on December 4, 1912, and if so, what warrants and in what amounts?

A. I don't believe I could.

LOUIS O'DONNELL, testified on behalf of Plaintiffs, as follows:

Q. Mr. O'Donnell, I call your attention to this, "Assessment Record No. 1, Pocahontas County," to the pages from 171 to 185 inclusive, and to the column headed "Amount on 1912 Tax List." You prepared those figures?

A. Yes, sir.

I haven't any other record or memorandum of the figures, except as appears in that book only on the tax list. I took them off this book and put them on the tax list. This book is the original record. I do not know the rate of interest I computed in arriving at the totals put in that column. I took the amount to be raised

97 and got a per cent of the amount of assessment and figured it out. I took the amount to be raised and used the amount of assessments confirmed by the Board and figured it; got the per cent.

Q. I call your attention to page 172 and to the name, Henry Smith, in the first column under the head of "Owner", and the description of four 40 acre tracts underneath his name and the amount you carried out opposite those tracts. Do you know what factor you used in making this out?

A. The same as I did all of them.

Q. I wish you would see if you did.

A. Unless I made an error.

Q. Well, just figure what percentage.

A. The per cent is a little bit better than 13%.

Q. Did you use the same percentage as on Smith?

A. Yes, used the same on all of them.

Q. Are your results accurate?

A. Haven't figured them all. Around 13.13 or 13.14. I think I made an error in figuring Smith's account.

Q. There is apparently an error in some of these calculations?

A. Some of them, yes, probably is.

A. L. THORNTON, testified on behalf of Plaintiffs, as follows:

I was an employee or assistant of the late W. B. Warrington who was the engineer on district No. 29. I was all around helper and assistant. I was with him in the work done in district 29 during the year of 1911, and prior to the so-called cleanout. Mr. Warrington died a year ago February 11th. I have his field notes.
98 Those books record certain measurements made in the field in which I assisted. I did not myself keep an independent record of the work done. I was not related in any way to Warrington. I still keep the office Mr. Warrington kept at that time. So far as his field notes or similar records, are concerned, they have been preserved there in that office. I have made a search to locate and find any and all records of Mr. Warrington's relating to any of these checking up or surveys. I searched everywhere where I thought there was any show of getting any data. I brought certain field books here. These books I have produced and are those now marked by the reporter Exhibits "2", "3", "4", and "5". So far as I have been able to find in my search and so far as I know there are no other books showing field notes with reference to re-surveys or checking up this work. That is for Branch A up to Station 23 plus. Outside of that there are some notes on Branch A, field records. They are construction survey notes. Some of them were for a later cleanout. Cleanout of the upper end of Branch A. They do not refer to any part of the work Mr. Hiatt did. These books here now are all that contained field notes on the part Hiatt did.

Q. Can you tell us on what pages of these books of any notes covering that part of the work?

A. Page 44 of Exhibit "5" relates to the survey.

Q. For the cleanout?

A. Yes.

I assisted in making that survey. The initials "W. B. W." and "A. L. T." those refer to the initials of Mr. Warrington and myself. Interpreting these columns, the first column there is what we call station column. Next Back side column. The third
99 column is the instrument height column. The fourth column is rod reading column. The fifth column is elevation column. The sixth column is the grade line column. The seventh column would be the cut. The next column would indicate that the cuts had been changed to a uniform amount or an equal amount, each of them. And column where the other cut column had been raised, an equal amount, each one of them. Next column is the cut converted into feet and inches. The next column is the top width. I am a civil engineer and am County engineer. I assisted in taking the levels and making the survey from which those field notes just described are taken. The whole book, Exhibit 5, is such a book as a civil engineer ordinarily records his surveys. The record is made in the usual and ordinary way. So far as I know, in making the survey the levels were taken correctly and accurately. I was a rodman and helping generally. From

those field notes I am able to say what the fall was in that ditch. The ninth column would indicate the fall in feet and inches for each station. I was familiar myself with Branch A. The upper part of Branch A above Station 23 plus was originally planned for a tile and changed to open ditch. As I remember the upper portion changed from tile to open ditch, was constructed in respect to bottom, width, and other dimensions greater than the lower part had originally been constructed. The upper part was one foot wider bottom and one foot wider top width than the lower part as originally built. I saw the lower part of Branch A after the reconstruction or recleaning work was done by Hiatt.

Q. And how did the bottom width after the reconstruction of the lower part of Branch A compare then with the bottom
100 width of the upper portion as it was built when changed to open ditch?

A. I did not make any measurements, but would say that it is comparatively the same. I think the bottom width had been increased of the lower part, to correspond with the upper part. Page 45 of Exhibit 5, also refers to the same work. The columns are the same in arrangement, with the exception of one less column. Those entries referred to are all in the handwriting of Mr. Warrington. The first four would have been made in the field. The others might be made in the field or in the office. That is the first and original record made by the engineer, these field notes of the survey. I do not know of any other record Mr. Warrington ever made of it. I have not been able to find any other. The original survey of Branch A is in exhibit 3, pages 99 and 100. Exhibit 3 is not in Warrington's handwriting. In Wheeler's. These books were found among Warrington's records where they were kept by him. I have not been able to find any record of the checking up of the excavation done by Hiatt under his recleaning contract. I did not assist in that rechecking. Do not know whether anyone went with Mr. Warrington. The portion of Exhibit 2, which is headed "Branch No. A" refers to the original construction survey. That is in Mr. Warrington's handwriting. Two pages refer to Branch A in that portion of Exhibit 2. They are double pages. That is the portion of Exhibit 2 which the reporter has now marked Exhibit 6. That is not the survey of the measurements made after the original construction. That would be levels run and cuts given to make the construction to make the excavation.

101 Cross-examination:

In the work that I assisted Mr. Warrington, I was the rodman and chain man. I made some of the surveys set out in Exhibits "2," "3," "4," and "5" myself. I do not know that Mr. Warrington set down the figures correctly. I do not know that the figures are a correct and true statement of the actual readings of the rod and chain.

The Exhibits identified by the witness, Thornton, in his testimony are as follows:

102 *Further Testimony of S. F. Moeller for the Plaintiffs.*

During the last few days I have examined the field notes of Warrington, contained in Exhibits "2," "3," "4" and "5" relating to Branch A of Drainage District No. 29. I made a survey of this portion of Branch A, which was originally built by Mr. Hiatt and afterward reconstructed or recleaned by him. My survey was made in Oct., 1914, and in Apr., 1915. I did not examine it before recleaning. I have gone over these field notes of Mr. Warrington's, referred to in Mr. Thornton's evidence, to ascertain what extent of filling there there was in this Branch A as shown by Warrington's notes. According to my computations from the notes, I find that the existing ditch on Sep. 2, 1911, contained a volume of 3120 cubic yards.

Q. Explain just what you mean by saying it contained that many yards. Do you mean that there was an excavation, the cross section of which would show 3120 yards not filled?

A. Yes, sir.

Q. What would be the amount of filling then either in yardage or in depth deducting the unfilled excavation?

A. I find from the same notes that the average depth or cut of the existing ditch at the time referred to, was 3.52 feet.

The difference in yardage of the existing ditch and the yardage for which Mr. Hiatt was paid in his first contract, was 709 yards. According to the estimates for the first construction of this part under Hiatt's contract, the total was 3829 yards. I simply deducted from that total, the yardage of the existing ditch as shown by

103 Warrington's survey Sept., 1911. If the ditch had been excavated to the original dimensions it would have required the removal of some 709 cu. yds. That would replace the ditch the same dimensions for which Hiatt was originally paid for construction. I have further examined Mr. Warrington's field notes in reference to this Branch A for the purpose of ascertaining what difference, if any, there was, in the bottom width of the Branch as reconstructed by Hiatt and the bottom width as shown in the original estimate or field notes upon which the original estimate was based. I examined the ditch as it exists for top and bottom width in April, 1915. I found the top and bottom width both are wider than originally planned. I find the average top width 20.2 feet from my survey. The average top width of the estimate originally from Mr. Warrington's notes is 15.4 feet. As found on my survey the bottom width averaged 8.4 feet.

Q. And Mr. Warrington's original survey was what average bottom width?

A. 4.8 feet. These notes of Mr. Warrington's are as the ditch was found on September 2, 1911, when it was cross sectioned for cleanout. The increased size of bottom width in that, would be due to the fact that the bottom had filled to some extent. Therefore raising the bottom up in the cross section of the ditch, which had sloped sides therefore increasing the width of the bottom.

Q. Do you know the original bottom width, shown by Warrington's original estimate?

A. Original plans are four foot bottom.

Q. And you found the bottom actually, on your survey, to have average width of 8.4 feet?

A. Yes, sir.

104 Q. Were your own surveys of that actually made?

A. I believe they were.

Q. Now, what is the grade of that ditch, approximately, that part of the ditch we are considering, up to Station 23 plus?

A. The notes on the recleaning show a grade of .03 per hundred feet.

Q. Is that what you call a flat grade, or otherwise, Mr. Moeller?

A. For a small ditch, it was a very flat grade.

Q. Would such a ditch wash, in that character of soil?

A. It will not.

Q. What do you say, then, based on your knowledge as an engineer, as to whether the width you found, 8.4 in the bottom, and 20.2 feet at the top, could have been due to any underwashing, or erosion of the soil, itself?

(Objected to by the Defendants as incompetent, irrelevant and immaterial, calling for mere opinion and conclusion of the witness, in addition to all objections heretofore already urged.)

A. A very small part of this extra width is due to erosion of the banks, falling into the bottom of the ditch, which material I believe now is deposited in the bottom of the ditch.

Q. Now, would that increase the width of the bottom, however?

A. Yes, to some extent.

Q. By raising the bottom?

A. Yes, sir.

Q. Mr. Moeller, what is the character of the soil through which that ditch is constructed? Is it firm and hard or a loose soil?

105 A. It is both. There is part of it through very marshy land, and part of it appears to have been constructed through hard-pan, in one portion there seems to be considerable gravel in the soil.

Cross-examination:

I made my examination of this ditch as late as the fall of 1914 and the last month in 1915. I did not see Mr. Warrington set down those figures in books 2, 3, 4, 5, and 6. I do not know where he was when he set them down. I do not know anything as to the correctness of the figures. Branch A, as now constructed, as I found it, is not in good condition. It is filled about one-half a foot. Judging from the notes, I would think it was necessary to clean out Branch A along about the time Hiatt cleaned it out. I believe some such work was necessary. It is considerably wider than necessary on a great portion of it, both at top and bottom. For small territories an open ditch in the vicinity of Fonda, under the conditions there existing, must necessarily be dug larger than is necessary to carry off the water alone.

Redirect examination:

I found the field notes of Mr. Warrington made in the usual manner that such notes are made by civil engineers.

Further cross-examination:

106 In my estimates, as to the number of yards in these ditches, I counted to station 23 plus 70 on Branch A of drain 29. My estimate as to the number of yards of siltage in that ditch now would be about four cubic yards to the linear foot based upon the present bottom width. That would approximate about 340 yards. Exhibits S, T-1, to T-12 inclusive, "U" offered in evidence.

Defendants' Evidence.

S. F. Hiatt, being duly sworn, testified for the Defendants, as follows:

Am one of the defendants in this action. Am forty-one years old. Have been engaged in the general drainage business for about nine years. I have had experience in drainage contract work in Pocahontas, Calhoun, Buena Vista and Palo Counties. Built two open ditches; is all the new work I have done. I have operated a cleanout machine for six years. As to the construction of drainage ditch involved in this controversy, the first work was done on Branch A. I made the improvement and the next work was when I took the contract for recleaning. The original construction I think was in 1909. I was engaged for about six months in that work.

Q. And when was it you took the contract for the cleaning out of this ditch?

A. That was in 1911—I ought to have posted up on that.

Q. Is Exhibit marked "X" the contract that was made in June, 1911, by you and the Board of Supervisors of Pocahontas County for the work in cleaning out the ditch?

107 A. Yes.

Exhibit "X" offered and introduced in evidence by the Defendant is as follows:

108 The main ditch was in use and operation about, I would say, four years before I entered upon the work of cleaning it out, under the contract Exhibit "X". The main open ditch was, I should think about twelve miles long. It was constructed in the southwest part of Pocahontas County. There was two open branches, A, and another. There was a number of tile branches. I had nothing to do with the construction and repair of tile branches. I think it was in 1906 when I first constructed or did any open drainage work in this County. The first ditch I built in Pocahontas County was fourteen, with teams and scrapers. We built it as nice as a ditch could be. It was partly through a slough and the next spring it had three feet of mud in it. The average filling in the main open ditch in this district was very light. In doing this work on the contract, marked "Exhibit X", I used what is called an orange

peel bucket; briefly, the operation of the machine; it is an ordinary hoisting engine with skid excavator. Operates from the side of the ditch and deposits the dirt from behind the machine. No part of the machine proper is in the ditch during the course of the operation. The bucket swings over the ditch and drops and the dirt is lifted straight up. I know Mr. Warrington, the engineer. He was in charge of the original construction and the cleanout work. He is now dead. He died after all of the work under the contract Exhibit "X" was completed. Branch A originally constructed, was constructed by me. I was there all the time myself. Excavating was done by horse and scraper. I started in the middle of April and got done about the 22nd day of November, 23 stations 2,300 feet on the cleanout of Branch A. They phoned me, I think at
109 Rockwell City, that they had some cleanout work they wanted done and to be here on a certain day and I came up. Attended a meeting of the Board of Supervisors of this County. My bid was 30 cents on the upper end of the ditch and 28 cents on the lower end. Do not know how much the other bids were. They were higher. I was familiar and acquainted well with all the members of the Board of Supervisors in 1911 and before that. I held other drainage work with the Board before that. I had one quite large contract in district 14, original construction, for about four miles. That was all finished and completed before I started 29. We used dynamite on Branch A. We struck some short places of what is called compact sand. Something our bucket wouldn't catch and it lacked a few inches of being down—no big amount but it had to be done so we put in about one-half dozen shots of dynamite. I would say it was original dirt that had never been removed. We used dynamite on Mercer's land in the reclean of the main ditch. Mr. Warrington gave me stakes as the work progressed. I would stake it out for every one hundred feet and tell me to reclean it to a certain distance on each side where it would start to break. He wanted to clean it out so the ditch would stand. I received instructions with reference to the depth and width I was to carry the work of recleaning out under this Exhibit "X" from Warrington. They were in writing in regard to the depth. As a general rule would tack them on the machine. I would get them and then give them to the operator of the bucket and he would put them up and after we were by the figures did not pay any further attention. Completed the work under this contract Exhibit "X" in July, 1912. Mr. Warrington on
110 completion of the work made a general examination and inspection of the same. He gave me a final estimate or certificate at that time. It is filed with the Auditor. As the work progressed, I received from time to time 80% of that estimate. Two of those 80% warrants have not been paid. I received a warrant from the County Auditor of this County August 16, 1912, No. 3740 for $4,334.18. It has never been paid. I am still the owner of this warrant. On the same date I received warrant No. 3741 for $2,107.60. I am still the owner of that. I have been paid in warrants, all the balance of the work performed under this Exhibit "X". I have not preserved the original grade cuts or instructions from Mr. Warrington. I made no effort to preserve them. To the best of

my ability I followed the instructions given me by Mr. Warrington, the engineer, in charge of the work. I have received, all told in warrants for the work under the contract Exhibit "X" 10,500 and some dollars. Have received all of it except the two warrants, $4,384.18 and $2,107.60. I had conversations with the Plaintiffs in this case as the work progressed but do not remember whom. I know Mr. Breiholz when I see him. Did not talk with him. I did with Mr. Clancey and Mr. Linnan. The cuts and instructions from Mr. Warrington have been all lost and destroyed. I paid no attention to them after I was through with them. In following those instructions I actually excavated and threw out more dirt than required by the instructions.

Q. What do you say on Branch A when you entered on the work under Exhibit "X" to clean that Branch? The ditch was as deep and wide then as when originally constructed or had it filled in and become narrow.

111 A. The ditch had filled in or practically filled up for the reason that it had been pastured with cattle in there and they were continually standing in the ditch.

The average depth of Branch A at the time of the original construction was probably right around three feet. This ditch at the time I entered on the work of cleaning that was under Exhibit "X", was in bad shape. Thomas Brothers were on the ditch at the time I made my bid here to the Board. Their boat was actually on the ditch. They had a dredge boat. Mr. Thomas was before the Board offering to clean out the ditch at the time I made my bid. I don't think he could have cleaned it out at all with the boat. Couldn't have gone to the top cut. It would have been impossible to lift it over the high bank. He could not have done the work without taking out the bridges. With my boat I am able to do the work without taking out the bridges. I rebuilt or reset my machine twice on the upper end and three times on the lower end. In regard to doing the work in Calhoun County, I hired two teams, and men and scrapers and put them to work in Calhoun County after getting permission from the men owning the land, and had them scrape and put in a ditch about two feet deep and about twenty feet wide for the distance of about two hundred feet, maybe two hundred fifty. I done that in order for us to have more fall and thought I would have better chances for the water to get through and that I would do a better job in general. I did not get any pay for that only in the betterment of the work above. The culvert in the ditch on the north side of the Busby land, I put that in when I dug Branch

A originally. When I came back with a cleanout I did not

112 deepen or lower that pipe. This ditch was not lowered any below the culvert at the north side of the Busby land. At the time the culvert was originally put in it might have been a trifle below the bottom of the ditch. I would consider the fair and reasonable price for the lower end, 28 cents per yard and for the upper end 30 cents. The cleanout was made wider because it was reasonably necessary to preserve the work.

Cross-examination:

Branch A was made wider probably two feet on top. A foot or six inches on the bottom. The original bottom width when first constructed I thought was four feet. It was made probably one and one-half feet wider and the second time probably one and one-half feet at the bottom. We never did very much measuring to see whether the machine was cutting as wide as the contract called for. We had as a rule gone on the conditions of the ditch regardless of the cuts the engineer gave us. I can't remember what the cuts called for. I have made no search for the cuts. The member of the Board who gave us instructions were Mr. Dooley. He told us to take out what would fill in. Mr. Dooley visited the ditch frequently. Gave me instructions. Followed these instructions as nearly as I could. Lieb visited the work; gave us instructions. Followed those instructions. Warrington visited the ditch. Gave us instructions and I followed those instructions.

Q. Now after you had followed the instructions of Lieb, Dooley and Warrington, Branch A, for example, you then left as you finished that branch, a certain sized ditch a certain cross section?

113 A. Yes, sir.

I cannot tell you how many yards I took out of Branch A. I don't know as I ascertained the number of yardage I was entitled to in Branch A.

Q. You do not really claim now that you are entitled to any more money for the excavation of A than the original contract called for?

A. No.

Q. You do know if you get the balance of these warrants you are now claiming you will be paid for some 3599 cubic yards on Branch A?

A. Believe that is it.

Q. You are now claiming to get 28 cents a yard for 3599 cubic yards in Branch A?

A. Yes, sir.

Q. And want it in this suit?

A. Yes——

Q. And expect these Plaintiffs and other tax payers to pay you for this yardage?

A. Yes, sir.

I was called up here from Rockwell City by telephone communication. Dooley phoned me. He said they had some work to let and to come up. I did not see it advertised in the newspaper. Did not ask why I was especially favored by such attention. The Board had never telephoned me prior to that time. That was the first time and the last time. I did not go to look at the ditch. I could guess about how much yardage would have to be excavated in that particular portion of the ditch whether high or low. I had finished the original construction of Branch A probably three years before. Had been on the ditch probably the spring before. I

had a talk with Warrington regarding the character of the
114 work. He told me it would be from Station 70 to Station 105 on the upper end of the main. On the lower end I think it was 230 stations. Don't remember of having any talk with him in regard to Branch A at that time. Don't believe I got any plats or profiles in the Auditor's office to look the work over and see what it looked like. I knew he had made a report. Think the report was there at the time of the letting. Did not read it. I asked Warrington what the correct yardage was involved in the ditch. I don't remember now the yardage he told me. I read the contract before signing. George Day drew the contract. I couldn't say whether I read the report or not before signing the contract. All the work I ever did on 29 was in Branch A. Since June, 1911, I have taken jobs of recleaning in drainage District No. 37, District 35, between Pocahontas and Calhoun, Rush Lake District in Sac County and three different jobs in District No. 1, Buena Vista County. I got 30 cents in District No. 1. In Rush Lake I got 25 and in 37 I got 22 or 23. There was a little variation in the ditches. I figured that the work in Branch A would be what Warrington told me and what the report showed and what the contract showed. I did not know what Warrington's plans were in June, 1911, for excavation of Branch A. Never found out. I did not consult my contract to see what yardage I would have to dig out of Branch A. I don't remember just what the contract does say in regard to A.

Q. Will you refresh your recollection from the contract Exhibit "X" and state if the yardage you were to take out of Branch A was 936 yards.

A. Yes, I remember seeing that in the contract.

Q. But you are now claiming for just one yard less than 3600 yards; practically four times the amount contemplated taking out when the contract was made, are you not?

115 A. Yes, sir.

Q. So at the time you made contract there was about 936 yards necessary to be taken out in order to put it in original shape?

A. Yes, sir.

Q. What happened after you made that contract between that time and the time you dug the ditch to make it necessary to dig four times as much yardage out of the ditch to put it in the condition it was in originally?

A. Conditions of the soil.

Q. What were they?

A. The ditch was, as I said before, filled up but it was a soft marshy soil and in order to make the ditch stand that it had to be dug wider and we dug it deeper, so if it filled any we would still retain our grade.

This additional size I gave to Branch A was the sole solicitation of Mr. Dooley. He was the only one that had me do anything extra. He was on the job very frequently. We had nicely got started and he came and said we were leaving the ditch too straight. Wanted the banks sloped. I thought he was right, the banks

needed sloping, so we sloped them. I really trusted my own judgment in making this additional excavation regardless of Warrington's instructions. I felt that I should do all in my power to make a good ditch. I figured I would naturally be paid for what I did and figured to make as good a ditch as possible. When I first dug Branch A I dug an average depth of three feet. The bottom was originally planned to be four. The side banks had a slope of one and one-half to one. The only information I have as to
116 how much yardage I was allowed for all this work is from the reports of the engineer. I am not able to say independently of Warrington's reports how many yards he found upon measurement, I had removed from the upper part of the work or how many yards from the lower part of the work except as he reports. I had no conversation with the engineer in regard to the Calhoun County outlet.

Q. I show you Exhibit "P", consisting of three sheets purporting to be three separate estimates on your contract on District No. 29. Those are the estimates, except the final estimate of Mr. Warrington, are they not the original estimates?

A. They probably are.

Q. And the last sheet of this bunch of papers marked Exhibit "H", is the final certificate of the engineer under the same work?

A. Yes.

Q. Now I call your attention to the memorandum on Exhibit "P"; take the first sheet, shows in Warrington's handwriting the amount of the first estimate, amount of the second estimate, and amount of the third estimate. Memorandum indicating the completion of the contract?

A. Yes, sir.

Q. And the figures are figures as to yardage which you relied on?

A. I think they are.

Q. The second sheet was a certain number of yards of excavation, made between certain dates, July 1, and August 23, 1911?

A. Yes.

Q. And the third sheet shows the amount of excavation made from August 23, to December 16, 1911?

117 A. Yes.

Q. And the third sheet calculates the amount of yardage excavated; that the estimate for the work done August 23, to December 16, 1911, is, according to Mr. Warrington's own memorandum on original estimates, made to cover your work on Stations 0 to 23 and the outlet in Calhoun County?

A. It is there—I don't remember seeing it before.

I couldn't say just the time I dug this outlet in Calhoun County. I did the work during the time the work was done between stations 0 and 115. Was given an estimate of 11000 yards of excavation from Stations 0 to 115. Station 0 began at the extreme end of the ditch as originally built. If anything was added to the estimate from 0 to 115, it would necessarily include that beyond 0, or the new ditch. I know that I got an estimate that covered more than between Stations 0 and 115. Any work I did below Station 0 was in

not recleaning but reconstruction work. I personally received those identical estimates marked Exhibit "P," from Warrington and filed them as evidence on which I was entitled to warrants. When I got the warrants from the Auditor I got them because of presenting these estimates. I had no right to be paid for work outside of the County. I dug that outlet below Station 0 about two feet deep, twenty feet wide, two hundred fifty feet long. It was a benefit to the ditch. I had two men, two days on that job. 389 yards of excavation there would be something like $100.00 for that two days work. Two men, and two teams are worth about $10. Twenty dollars for two days' work. I started this work of recleaning before Thomas had finished Branch B. The work of redigging, I did the upper end of the ditch first; next, the lower main; Branch A last.

118 I finished it all within a year from the time I began. Did the work with one machine, three men, including myself. Did not do the work during the winter time. Continuous working, it took about nine months, of twenty-five days a month. I should think I put in two hundred to two hundred twenty-five days in the contract. The daily expense would run around $20 a day. The machine cost $2000. With the exceptions of the slope I took out all the dirt on Branch A, with the machine the second time. Worked with scrapers and team on one side of Branch A. I did not pay any attention at the letting to any of the bidding. Did not know who bid. I saw Thomas and there was stranger or two in the Board of Supervisor's office, but I did not know them. I was on perfectly friendly terms with the Board. Lived in Fonda part of the time. Dooley lived there.

Redirect examination:

I have previously done work for this Board and for Mr. Warrington. Those relations have been agreeable. Never had any trouble or dispute with the Board about settling up any of the contracts. Mr. Warrington had charge of a great deal of ditch work in this County. I have worked under him taking contracts where he had made the specifications before this. Found these specifications approximately correct in the previous work done. The first estimate was for $3,080, second estimate $2,040.30, third estimate $5,417.72. Total amount $10,538.00. I did not ask any one to pay me for the work I did in Calhoun County. I did not at any time ask Mr. Warrington or other person to compute the amount of yardage

119 done in Calhoun County. The work I did on this particular ditch and Branch A was reasonably necessary in order that the ditch itself should be preserved.

Further cross-examination:

Q. If you had taken out 40,000 more yards it would have helped? The bigger you make them the longer they will stay open?

A. Yes, sir.

I did not check up the work on Branch A in the second construction. Did not check up between Station 0 and 115 and in Calhoun.

I do not know whether I ever figured up Branch A or not on the second construction.

Further direct examination:

I could not tell without measuring the amount of work so as to know approximately as to whether the engineer is treating me fairly or not.

Exhibit "X," contract introduced by the Defendants as part of the examination of the witness, Hiatt, is as follows:

Auditor's office, Pocahontas, Iowa, Tuesday, June 8, 1911.

W. B. Warrington, engineer, having filed a report on March 6, 1911, recommending that the open work in Drainage Improvement District No. 29 should be cleaned and it appearing to the Board of Supervisors that it is expedient that said drainage improvement should be reopened and cleared and otherwise repaired for the better service of the lands tributary thereto and the lands having
120 contributed toward the construction thereof and the Board of Supervisors having examined the report of W. B. Warrington, engineer as filed by him on March 6, 1911, and having carefully considered the matter, it hereby finds and determined that the cleaning, reopening, and repairing of said improvement will be for the best interests of the public rights affected thereby. Therefore, said engineer's report is hereby approved and the said improvement ordered to be cleaned, reopened, and repaired in accordance therewith.

On motion, S. F. Hiatt was employed to do the work of cleaning, reopening, and repairing said open work in Drainage District No. 29 as specified in the engineer's report at the price of thirty cents per cubic yard for the upper end approximately about 7317 cubic yards and the lower end at twenty-eight cents per cubic yard approximately 36,104 cubic yards and the Chairman of the Board of Supervisors and the County Auditor are hereby authorized to enter into contract with the said S. F. Hiatt for the performance of said work.

Contract of S. F. Hiatt.

This agreement made in duplicate and entered into this 9th day of June, 1911, by and between Pocahontas County, Iowa, and the Board of Supervisors of Pocahontas County, Iowa, in behalf of Drainage Improvement District No. 29 acting through the Chairman of the Board of Supervisors and the County Auditor of Pocahontas County, Iowa, party of the first part and S. F. Hiatt of Rockwell City, Iowa, party of the second part, witnesseth:

Whereas by resolution of the Board of Supervisors of Po-
121 cahontas County; S. F. Hiatt has been employed to do the work of cleaning out and repairing certain portions of said drainage improvement District No. 29 and the Chairman of the

Board of Supervisors and the County Auditor of said County were authorized to execute contracts with the said S. F. Hiatt for said work.

Now therefore it is agreed as follows, to wit:

Party of the second part hereby agrees to deepen, clean, reopen and repair said Drainage District No. 29 from Station Zero to Station 37 in the manner and to the proportionate depth and width as specified in the report of W. B. Warrington, filed March 6, 1911, and from Sta. 37 to Sta. 87, from Sta. 87 to Sta. 170, from Sta. 170 to Sta. 250, the above approximating about 35168 cubic yards herein called the lower end of said drainage district, also in addition to the above mentioned work in the lower end of said district, second party agrees to clean, reopen and repair Branch "A" of said district from Sta. Zero to Sta. 23 as specified in the engineer's report approximating about 936 cubic yards in said Branch "A," the same to be done as part of the lower end of said district, and to clean, reopen, deepen and repair said drainage improvement from Sta. 402 to Sta. 500 as specified in said engineer's report and approximating about 7317 cubic yards, and herein called the upper end of said district, agreeing to clean, reopen, and deepen said improvement according as the same is specified by said engineer's report, and agreeing that no material removed in the cleaning, reopening and repairing shall be deposited on the inside of the present banks of said improvement, the party of the second part to furnish all labor and material used in said repairing, reopening, and cleaning, to do all work in a good workmanlike man-
122 ner and to be governed in the performance of his part of said contract by the provisions of the Acts of the 30th G. A. Chapter 68 and all acts amendatory thereto relative to the construction of drainage improvement, and to be subject to all conditions thereto relative to the construction of drainage improvement, and to be subject to all conditions as therein contained, except as may be herein expressly waived, agreeing to begin work as early as is convenient, and practicable, having in mind the proper and skillful construction of said improvement, to begin the work not later than July 1st, 1911, and to complete the same on or before July 1st, 1912.

Party of the second part agrees to reopen, repair and clean said improvement under the supervision of the engineer in charge, to use all possible precaution in the prosecution of said contract, to do as little damage to the farms or land through which said improvement shall pass as the nature of the work will permit, second party agreeing that all claims for material furnished and labor performed shall be paid and satisfied in full and proper receipts and vouchers furnished therefor, or such other satisfactory evidence of the payment of the same as the Board may require before the acceptance and final payment by the party of the first part.

It is further understood and agreed by and between the parties hereto that where the proposed drainage improvement shall pass any public highway the second party shall take all precaution to prevent accidents occurring to the public and shall protect all excavation with proper signals and warnings, second party to be responsible for all

damages resulting from his negligence in failing to guard
123 the work, either on the public highway or any where else along the course of said proposed ditch.

It is further agreed that the party of the first part shall not be responsible for delay, loss or damage not directly caused by the express official orders of the said party of the first part made after the execution hereof, not for the actions or omissions of any person in the employ of the party of the first part or in case of injunction suit being brought, or if, for any unavoidable cause, it shall become necessary to stop the work provided for herein, the party of the first part shall be in no wise liable for any loss or damage caused by such delay, and the time within which said work is to be completed shall be extended for the full time of the delay occasioned by said suit if any be brought, provided, however, that said suit is not based directly or indirectly on or caused by the negligence or other act of said second party, his agents or servants.

It is further understood and agreed that the date of commencing and completion of said work herein provided for shall be construed as of the essence of this contract.

In consideration of the foregoing the party of the first part hereby agrees to pay said party of the second part in full for all services performed in pursuance of this contract, the sum of twenty-eight (28 cts.) cents per cubic yard for all excavations or dirt removed from the lower end of said district approximating according to the engineer's report, 36104 cubic yards which includes the work on Branch "A" of said district and Thirty (30) cents per cubic yard for the work in the upper end of said district approximating according to said engineer's report, 7317 cubic yards, all sums of
124 money due the party of the second part for material furnished or labor performed to be paid by the party of the first part in warrants upon the Drainage funds of said District No. 29, or in Drainage Improvement Certificates at the election of party of the first part, the same to be paid in all cases according to the provisions of the Acts of the 30th G. A., Chapter 68, and Acts supplemental and amendatory thereto relative to the payment of said claims, both parties to be governed in these premises by the provisions of the Acts of the 30th G. A., Chapter 68, and Acts supplementary and amendatory thereto relative to the construction and acceptance of said work, penalties and payments and all other matters therein pertinent to the construction of said improvement as may be herein expressly or otherwise agreed upon.

It is further understood that should the sections of said improvement herein described be not completed within the time limited herein, the liquidated damages shall be and they are hereby stipulated to be Ten Dollars for each and every day that said portion of said work shall remain unfinished from and after the time set for the completion, which sum shall be taken and accepted as liquidated damages to recompense party of the first part for the failure and breach of said portion of this contract to complete said sections within the time above prescribed, and an action at law may be maintained by the party of the first part against the party of the second part or

his bondsmen or both, at the election of party of the first part for the recovery of such liquidated damages.

To all of which both parties hereunto agree.

125 Witness our hands and the seal of said county, this 9th day of June, 1911.

M. J. DOOLEY,
Chairman Board of Supervisors.
J. A. TERRY,
County Auditor. [SEAL.]

S. F. HIATT,
Contractor.

G. P. SMITH testified on behalf of Defendants, as follows:

My business is a civil engineer. Experience seven or eight years. During that time has been largely that of drainage work in northwestern Iowa. Have observed drainage ditches often. I have looked over drainage district 29 in Pocahontas County. In July and August, 1908, made survey of the entire district and again in October, 1912, made two examinations of the district. Survey in 1908 was made for the purpose of platting the drainage district. The district had already been established and partly constructed but I think that it was decided that the surveys were not sufficient, did not furnish sufficient data for the work and at that time I made the survey over. In 1912 I was employed by Mr. Allen in an assessment appeal of the district. I examined the district at that time so specifically as to be able to testify as to what would be proper assessments, especially in the Allen case. In making that examination I divided the district into different elements or Branches. I discovered how much the land tributary to each of these branches had in fact paid under the assessment which was levied in the district.

Exhibit "W," which has just been identified by the reporter
126 shows the results of my investigation as to what the cost of each branch was and as to what amount was raised on each branch. In estimating the cost of each branch where the contract did not show the cost of separate lines the tile contract was divided between different lines in direct proportion to the engineer's estimate and to the cost of the open work were added damages as allowed for each particular branch. The ink items on this Exhibit "W" shows the actual cost of constructing the branch plus the 5.2% which was the percentage raised in this district for expense. That was what was called overhead charge. The overhead charge is the difference between the contract price and the damages, and the total assessment. I found the main was filled up somewhat at the time of my first examination in 1908. Branch A was then under construction. The fall on the lower portion of the main drain and on Branch A was very flat. Above the Illinois Central railroad crossing or thereabout on the main the fall is then steep or greater for two or three miles until the line nears the large sloughs located in the upper portion of the district. The upper portion of the drain is flat again. Branch

B has a greater fall than the main below the outlets of Branch B. In order to get the benefit of Branch B and preserve the usefulness of Branch B it will be necessary to keep the main reasonably free from silt. I am familiar with the method of digging such ditches and the method of cleaning them out. An orange peel bucket cannot be operated on hard soil. I would say the fair and reasonable price for cleanout work in a ditch, such as this, along the main and also along Branch A, would be from twenty-five or six to thirty or thirty-one cents. I have made some investigation about the costs of cleanouts.

127 Cross-examination:

I do not believe in paying a certain price, if not excessive, if I can get the work done for less. I have not had charge of cleanout work. I am familiar with several jobs but have not had charge. I surveyed this district 29 for the benefit commission—The Parsons commission. The lands of all of these Plaintiffs, except one, is in the area served by Branch B. My classification follows closely the Parsons commission.

Q. Now, Mr. Smith, if your method of classification had been followed in this district, all the land would be assessed for its proportionate cost of the main.

A. Yes, sir.

Q. Then the lands served by independent laterals or by laterals would also be assessed for its proportionate cost of that lateral?

A. Yes, sir.

Q. And if that method had been followed, cleanout of the main ditch would have spread necessarily in the same proportion as the original cost of that main ditch?

A. I presume so, if it were of record.

In this particular case the final assessment was made by what was called the Skeels commission. The Skeels commission lumped the costs and damages for the entire district in one lump sum and spread it over the entire ditch as one unit, without reference to and served by various laterals. I recall from my investigation that the cost of Branch B itself is a considerable sum in proportion to the area served by it.

128 Q. Now, if the proper owners in that area had been assessed a sum in proportion to the rest of the district as one lump sum and are assessed now in accordance with the original assessment in proportion to that for the cost and cleanout, they may get excessive assessments, in proportion to the benefits from the cleanout itself, and so may the property owners in every special drainage area served by an expensive tile. Is that correct?

A. If they had originally paid in proportion to the cost of their tile line and now paid on a basis of the original assessment, which was practical for a tile line, they would of course pay for the cleanout in proportion to the cost of their tile line, and the main together. And if their tile line were more expensive, would make the cleanout tax heavier.

As I remember, Branch "B" or "A" was being constructed originally when I first saw it. It was a small open ditch three or four feet bottom. I have not seen the ditch excavated after it was reconstructed. It is my opinion that the entire basis of the Skeels assessment was incorrect.

M. J. DOOLEY testified for the Defendants as follows:

I am a member of the Board of Supervisors of this County. Have been for many years. Was a member of the Board at the time district No. 29 was first built and have been ever since. My home is at Fonda and this ditch is down in my district. After the ditch was built, especially after Branch A was built and just previous to the time I met Mr. Hiatt and made a contract with him for the cleanout, Branch A was in pretty bad shape. The ditch was pretty well filled. Wasn't full of course, but badly filled and the
129 banks were ragged and overhanging. I was there a couple of times on Branch A when they were working at the cleanout. The overhanging banks were scraped off and cleaned away.

Q. Did you—were you present when Sam Hiatt took the cleanout contract?

A. Yes, sir.

Q. Tell us about that with reference to what happened that day and what led to the making of the contract. Did you have Hiatt present for the purpose of submitting offers to the Board on the cleanout?

A. Yes. I think I phoned him to come up, that the boys wanted to see him; but in the meantime the engineer had made report that the ditch was in bad shape and needed cleaning and Sam Hiatt, I understood, was doing some work in Calhoun County, and I think I phoned him to come up and meet the Board in session such and such a day and he came and we told him what we wanted done.

Q. And he made you a bid on the work?

A. Yes, sir. Said he would take the contract for 30 cents per yard.

We explained to him that the lower end had a big yardage and we ought to get it done cheaper and finally agreed on 28 cents for that and 30 cents for the upper end. I engaged in that conversation and the Board did. Thomas had a boat on the ditch. His boat was on the upper end of the old ditch, and we tried to get him to clean up the upper end or the old ditch. He said he would clean up the upper end down to what we called the Samuelson cut in the ditch. Said his boom was not long enough to do it. He offered to clean it down to that for $2,000. Previous to the time of the the agreement
130 with Hiatt for the cleanout, I had talked with members of the Board of Calhoun County about him. He was recommended by the Calhoun County Board as a good man for that kind of work. He was working on the job, I think, ten days after the date of the letting.

Cross-examination:

Q. I call your attention to report under date of Nov. 11, 1910, found among the papers of Exhibit "H." Mr. Warrington called your attention to the main ditch in 29 filled to such an extent as to cause Branch A to fill and "I recommend that you have it cleaned. Think Branch A should be cleaned from Station 0 to 23 and the main ditch from Station 0 to 90. There will be 500 cubic yards in Branch A and 1,000 in the main."

A. I think the Board sent him out later to investigate the entire ditch and he made another report.

Q. Why didn't you act in November, 1910?

A. It was late in the season.

Q. You could have advertised for bids and got competition?

A. Yes, sir. The Board had not taken up the matter of cleaning of the ditch particularly until the spring of 1911.

The assessment was not made or confirmed for the first ditch until November, 1911.

Q. You appreciated the fact that the contract you were going to make with Hiatt, involved the sum of ten thousand dollars or more?

A. Yes, sir.

Q. It seemed like an important contract, didn't it, Mr. Dooley?

A. Very much so.

131 Q. Who else did you telephone, besides Hiatt?

A. Nobody.

Q. He was the only one you invited, was he?

A. The only one.

Q. He lived in the same town you did?

A. He wasn't living there then—he had lived there, yes.

Q. And you personally telephoned him at Rockwell City?

A. I think so—I don't know. I may have wrote to him. I did it by request of the Board. I was chairman.

Q. You passed no resolution, directing you to call up? Just talked it over with them, and they said it would be agreeable to do that?

A. Yes, sir.

Q. That is all.

The following is Exhibit from drainage assessment record No. 1, pages 171 to 178 inclusive, showing original assessment and reassessment for recleaning in drainage district No. 29, as testified to by the witness, Day, and the witness, O'Donnel.

Description.	Sec., twp., range.	No. points.	Amount.	1912.
SE¼ SE¼	32-91-33	65	$25.61	$3.37
SW¼ SE¼	33-91-33	40	15.76	2.07
NE¼ NW¼	4-90-33	110	43.34	3.96
SE¼ NW¼	4-90-33	360	141.84	27.16
NW¼ NW¼	4-90-33	450	177.30	33.96
SW¼ NW¼	4-90-33	1,365	462.81	88.65
NE¼ SW¼	4-90-33	30	11.82	2.23

Description.	Sec., twp., range.	No. points.	Amount.	1912.
NW¼ SW¼	4-90-33	1,170	360.98	69.15
SW¼ SW¼	4-90-33	1,140	349.16	66.86
SE¼ SW¼	5-90-33	30	11.82	2.23
NE¼ NE¼	5-90-33	325	128.05	16.85
132				
SE¼ NE¼	5-90-33	1,400	500.60	65.85
NW¼ NE¼	5-90-33	812	319.93	42.10
SW¼ NE¼	5-90-33	1,800	609.20	80.15
NE¼ NW¼	5-90-33	616	200.70	26.40
NW¼ NW¼	5-90-33	75	29.55	3.86
SW¼ NW¼	5-90-33	330	100.02	13.14
SE¼ NW¼	5-90-33	800	265.20	34.88
NE¼ SW¼	5-90-33	100	300.00	39.42
NW¼ SW¼	5-90-33	585	124.60	16.37
SW¼ SW¼	5-90-33	1,520	323.76	42.58
SE¼ SW¼	5-90-33	780	307.32	40.42
NE¼ SE¼	5-90-33	3,900	1,200.60	157.97
NW¼ SE¼	5-90-33	2,730	800.62	105.34
SW¼ SE¼	5-90-33	2,775	893.35	117.54
SE¼ SE¼	5-90-33	2,730	900.62	118.50
NE¼ SE¼	6-90-33	285	60.71	7.96
SW¼ SE¼	6-90-33	238	50.69	6.65
SE¼ SE¼	6-90-33	555	118.22	15.53
NE¼ NE¼	7-90-33	1,710	464.23	61.07
NW¼ NE¼	7-90-33	870	185.31	24.36
SW¼ NE¼	7-90-33	450	95.85	12.58
SE¼ NE¼	7-90-33	1,170	299.21	39.35
NE¼ NE¼	8-90-33	380	149.72	19.68
NW¼ NE¼	8-90-33	2,660	848.04	111.58
SW¼ NE¼	8-90-33	1,755	600.47	79.00
SE¼ NE¼	8-90-33	585	230.49	30.31
NE¼ SE¼	8-90-33	1,755	403.82	53.12
NE¼ NW¼	8-90-33	1,520	500.88	95.92
NW¼ NW¼	8-90-33	1,330	283.29	54.20
SE¼ NW¼	8-90-33	780	307.32	48.80
SW¼ NW¼	8-90-33	1,170	249.21	32.77
NW¼ SW¼	8-90-33	1,365	290.74	38.24
SW¼ SW¼	8-90-33	760	161.88	21.30
133				
NE¼ SW¼	8-90-33	3,900	767.83	178.30
SE¼ SW¼	8-90-33	3,800	733.76	81.44
NW¼ SE¼	8-90-33	2,925	571.75	132.76
SW¼ SE¼	8-90-33	3,800	742.00	172.30
SE¼ SE¼	8-90-33	3,230	633.60	147.11
NW¼ NW¼	9-90-33	390	153.66	20.20
SW¼ NW¼	9-90-33	585	180.49	23.73
SE¼ NW¼	9-90-33	300	118.20	22.62

Description.	Sec., twp., range.	No. points.	Amount.	1912
NE¼ SW¼	9-90-33	540	115.02	15.11
SE¼ SW¼	9-90-33	660	140.58	18.62
NW¼ SW¼	9-90-33	584	124.60	16.37
SW¼ SW¼	9-90-33	760	161.88	21.30
NE¼ NW¼	16-90-33	112	23.86	3.08
NW¼ NW¼	16-90-33	230	48.99	6.58
SW¼ NW¼	16-90-33	200	52.59	6.90
NE¼ SW¼	16-90-33	480	262.08	50.18
NW¼ SW¼	16-90-33	780	385.92	73.91
SW¼ SW¼	16-90-33	1,520	829.92	159.06
SE¼ SW¼	16-90-33	2,730	1,490.58	285.57
NW¼ SE¼	16-90-33	150	81.90	15.66
SW¼ SE¼	16-90-33	875	477.75	91.51
SE¼ SE¼	16-90-33	30	16.38	3.08
NE¼ NE¼	17-90-33	1,140	262.82	50.25
NW¼ NE¼	17-90-33	3,510	827.63	158.53
SW¼ NE¼	17-90-33	800	170.40	32.62
SE¼ NE¼	17-90-33	780	166.14	31.77
NE¼ SE¼	17-90-33	780	166.14	31.77
NW¼ SE¼	17-90-33	800	170.40	32.62
SW¼ SE¼	17-90-33	585	199.53	35.20
SE¼ SE¼	17-90-33	1,140	502.56	96.26
NE¼ NW¼	17-90-33	2,405	562.26	73.97
NW¼ NW¼	17-90-33	925	197.03	25.90
SW¼ NW¼	17-90-33	555	118.22	15.53
134				
SE¼ NW¼	17-90-33	600	127.80	16.83
NE¼ SW¼	17-90-33	600	127.80	16.83
NW¼ SW¼	17-90-33	780	166.14	21.81
SW¼ SW¼	17-90-33	555	118.22	15.53
SE¼ SW¼	17-90-33	585	124.60	16.37
NE¼ NE¼	18-90-33	1,140	242.82	31.93
SW¼ NE¼	18-90-33	100	21.30	280.00
SE¼ NE¼	18-90-33	780	166.14	21.81
NE¼ SW¼	18-90-33	400	85.20	16.31
NW¼ SW¼	18-90-33	250	53.25	1,000.19
SW¼ SW¼	18-90-33	1,000	213.00	40.78
SE¼ SW¼	18-90-33	925	197.03	37.72
NE¼ SE¼	18-90-33	1,850	300.05	39.42
NW¼ SE¼	18-90-33	600	127.80	16.83
SW¼ SE¼	18-90-33	925	197.03	25.90
SE¼ SE¼	18-90-33	950	202.35	26.60
NE¼ NE¼	19-90-33	760	202.36	26.60
NW¼ NE¼	19-90-33	780	236.98	31.25
SW¼ NE¼	19-90-33	1,200	584.20	76.86
SE¼ NE¼	19-90-33	780	388.48	51.10
NE¼ NW¼	19-90-33	390	128.61	16.92
SE NW	19-90-33	400	171.22	22.51

Description.	Sec., twp., range.	No. points.	Amount.	1912.
NW NW	19-90-33	675	143.78	18.92
SW NW	19-90-33	714	152.08	20.00
NE SW	19-90-33	1,000	506.00	66.56
NW SW	19-90-33	1,200	407.40	2.05
SW SW	19-90-33	1,338	471.71	14.90
SE SW	19-90-33	780	403.48	53.15
NE SE	19-90-33	1,560	751.96	98.93
NW SE	19-90-33	1,400	672.40	88.46
SW SE	19-90-33	780	403.48	53.15
135				
SE SE	19-90-33	760	394.16	51.85
NE NE	20-90-33	1,330	726.18	95.54
SW NE	20-90-33	800	396.80	52.20
SE NE	20-90-33	975	532.35	101.97
NW NE	20-90-33	390	197.74	26.00
NE NW	20-90-33	390	148.85	19.56
NW NW	20-90-33	380	118.89	15.66
SW NW	20-90-33	780	363.48	69.61
SE NW	20-90-33	2,200	775.20	148.51
NE SW	20-90-33	800	376.80	49.56
NW SW	20-90-33	1,170	525.22	69.10
SW SW	20-90-33	570	200.22	38.31
SE SW	20-90-33	975	432.35	82.80
NE SE	20-90-33	1,755	958.23	188.85
NW SE	20-90-33	600	327.60	62.75
N 10A SW SE	20-90-33	150	81.90	15.66
N 10A SE SE	20-90-33	700	382.20	73.21
SP & SW SE	20-90-33	1,305	600.53	79.00
SP & SE SE	20-90-33	700	382.20	50.28
NE NW	21-90-33	1,020	556.92	106.68
NW NW	21-90-33	570	311.22	59.60
SW NW	21-90-33	340	185.64	35.54
SE NW	21-90-33	150	81.90	15.66
NW SW	21-90-33	190	103.74	19.85
SW SW	21-90-33	90	49.14	9.39
NW NE	29-90-33	180	98.28	17.00
			331.00	
NE NW	29-90-33	760	414.96	79.49
			131.32	
NW NW	29-90-33	570	164.22	31.45
			242.40	
SW NW	29-90-33	555	303.03	58.03
			190.00	
136				
SE NW	29-90-33	435	237.51	44.48
NW SW	29-90-33	290	158.34	30.30
SW SW	29-90-33	420	229.32	43.90
NE NE	30-90-33	570	311.22	40.93

Description.	Sec., twp., range.	No. points.	Amount.	1912
SE NE	30-90-33	1,665	909.09	119.55
NW NE	30-90-33	780	425.88	56.02
SW NE	30-90-33	1,000	546.00	71.84
NE NW	30-90-33	975	207.68	39.77
SE NW	30-90-33	800	210.36	40.30
NW NW	30-90-33	1,505	320.57	42.20
SW NW	30-90-33	1,335	284.36	37.42
NE SW	30-90-33	800	316.92	41.70
NW SW	30-90-33	1,335	284.36	37.42
SW SW	30-90-33	1,085	342.66	45.07
SE SW	30-90-33	1,365	687.02	90.40
NE SE	30-90-33	760	414.96	54.60
NW SE	30-90-33	1,600	873.60	167.35
SW SE	30-90-33	1,710	933.66	178.86
SE SE	30-90-33	1,900	1,037.40	136.50
Lot 1	31-90-33	660	360.36	47.40
Lot 2	31-90-33	1,540	840.84	110.63
Lot 3	31-90-33	1,020	556.92	73.27
Lot 4	31-90-33	1,250	474.38	62.40
SW NE	31-90-33	25	533.00	.70
SW NW & NW NW	31-90-33	500	106.50	14.00
SE NW	31-90-33	800	170.40	22.61
NE SW	31-90-33	40	8.52	1.10
NW SW	31-90-33	440	93.72	12.31
SW SW	31-90-33	140	29.82	391.00
NW NW	32-90-33	188	102.65	13.48
NE SE	13-90-34	28	5.97	.80
SE SE	13-90-34	495	105.44	13.87
137				
NE SW	23-90-34	375	123.00	16.18
NW SW	23-90-34	975	219.80	28.90
Pt SW SW	23-90-34	870	285.36	37.55
Pt SW SW	23-90-34	270	88.56	11.63
SE SW	23-90-34	780	255.84	33.64
NE SE	23-90-34	50	16.40	2.13
NW SE	23-90-34	30	9.84	1.27
SW SE	23-90-34	1,170	383.76	50.50
SE SE	23-90-34	1,520	498.56	65.60
NE NE	24-90-34	1,295	275.84	36.28
NW NE	24-90-34	50	10.65	1.40
SW NE	24-90-34	1,200	255.60	33.62
SE NE	24-90-34	1,710	300.23	39.45
SE NW	24-90-34	250	23.25	3.02
NE SW	24-90-34	600	89.90	11.81
NW SW	24-90-34	680	123.04	16.18
SW SW	24-90-34	570	100.96	13.28
SE SW	24-90-34	780	188.84	24.85
NE SE	24-90-34	1,710	364.23	47.93

Description.	Sec., twp., range.	No. points.	Amount.	1912.
NW SE	24-90-34	1,000	213.00	28.00
SW SE	24-90-34	780	166.14	21.81
SE SE	24-90-34	1,365	290.74	38.25
NE NE	25-90-34	1,140	242.82	31.95
NW NE	25-90-34	975	207.68	27.32
SW NE	25-90-34	1,000	213.00	28.00
SE NE	25-90-34	780	166.14	21.81
NE NW	25-90-34	780	200.84	26.42
NW NW	25-90-34	950	386.60	50.85
SW NW	25-90-34	1,170	438.76	57.73
SE NW	25-90-34	600	146.80	19.30
NE SW	25-90-34	600	162.30	21.35
NW SW	25-90-34	1,170	383.76	50.50
SW NW	25-90-34	875	316.88	41.70
138				
SE SW	25-90-34	975	207.68	27.32
NE SE	25-90-34	780	166.14	21.81
NW SE	25-90-34	600	127.80	16.83
SW SE	25-90-34	1,170	249.21	32.74
SE SE	25-90-34	1,330	283.29	37.26
NE NE	26-90-34	1,140	373.92	49.20
NW NE	26-90-34	2,145	703.56	92.56
SW NE	26-90-34	1,560	511.68	67.31
SE NE	26-90-34	1,520	498.56	65.60
NE NW	26-90-34	1,710	560.88	73.91
N½ NW NW	26-90-34	648	212.54	27.96
S½ NW NW	26-90-34	682	223.70	29.41
SW NW	26-90-34	1,125	369.00	22.22
S½ SE NW	26-30-34	880	288.64	37.96
N½ SE NW	26-90-34	1,045	342.76	25.10
NE SW	26-90-34	1,170	433.76	57.06
NW SW	26-90-34	1,480	485.44	63.86
N Ry SW SW	26-90-34	45	14.76	1.93
S Ry SW SW	26-90-34	480	157.44	20.70
S Ry SE SW	26-90-34	375	123.00	16.18
N Ry SE SW	26-90-34	165	54.12	7.09
NE SE	26-90-34	1,710	560.88	73.91
NW SE	26-90-34	1,170	383.76	50.50
SW SE	26-90-34	1,800	590.40	77.67
SE SE	26-90-34	1,700	557.60	73.34
SE NE	33-90-34	170	36.21	4.76
NE SE	33-90-34	330	70.29	9.25
NW SE	33-90-34	15	3.20	.42
SW SE	33-90-34	50	10.65	1.40
SE SE	33-90-34	360	76.68	10.08
NE NE	34-90-34	540	202.12	26.57
NW NE	34-90-34	352	74.98	9.84
SW NE	34-90-34	390	83.07	10.93
N Ry SE NE	.....	...	22.00	2.89

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Description.	Sec., twp., range.	No. points.	Amount.	1912.
SP & SE NE	34-90-34	489	102.86	15.52
NE NW	34-90-34	330	100.29	13.14
NW NW	34-90-34	130	31.95	4.20
SW NW	34-90-34	390	133.07	17.50
SE NW	34-90-34	540	165.02	21.70
NE SW	34-90-34	585	174.60	22.95
NW SW	34-90-34	720	199.36	26.22
SW SW	34-90-34	570	121.41	15.95
SE SW	34-90-34	570	121.41	15.95
NE SE	34-90-34	975	257.68	33.91
NW SE	34-90-34	585	124.60	16.37
SW SE	34-90-34	570	121.41	15.95
SE SE	34-90-34	570	171.41	22.51
NE NE	35-90-34	780	300.84	39.50
NW NE	35-90-34	585	191.88	25.25
SW NE	35-90-34	600	182.98	24.08
SE NE	35-90-34	400	96.70	12.72
NE NW	35-90-34	585	191.88	25.25
NW NW	35-90-34	570	186.96	24.60
SW NW	35-90-34	570	173.16	22.76
SE NW	35-90-34	570	135.21	17.47
NE SW	35-90-34	380	80.94	10.65
NW SW	35-90-34	501	146.71	19.30
SW SW	35-90-34	950	262.35	34.50
SE SW	35-90-34	373	79.45	10.43
NE SE	35-90-34	1,900	600.70	79.01
NW SE	35-90-34	925	300.03	39.42
SW SE	35-90-34	900	241.70	31.80
SE SE	35-90-34	1,560	550.28	72.40
N Ry NE NE	36-90-34	1,210	287.73	37.85
S Ry NE NE	36-90-34	605	168.87	22.20
S Ry NW NE	36-90-34	575	122.48	16.13

140

N Ry NW NE	36-90-34	325	69.23	9.11
SW NE	36-90-34	800	170.40	22.61
SE NE	36-90-34	555	168.22	22.18
NE NW	36-90-34	540	115.02	15.11
NW NW	36-90-34	585	159.11	20.92
SW NW	36-90-34	400	85.20	11.20
SE NW	36-90-34	1,000	138.00	17.16
NE SW	36-90-34	950	252.35	33.18
NW SW	36-90-34	1,520	473.76	62.34
SW SW	36-90-34	1,560	550.28	72.40
SE SW	36-90-34	780	166.14	21.81
NE SE	36-90-34	975	207.68	27.32
SE SE	36-90-34	760	161.88	21.30
NW SE	36-90-34	925	197.03	25.92
SW SE	36-90-34	975	207.68	27.32

After said cause was fully submitted and argued in the District Court of Iowa, in and for Pocahontas County on the last day of the October, 1915, term of said Court, being the — day of October, 1915, the said Court took said case under advisement and on the 26th day of March, A. D. 1917, the Court duly rendered the following decree and judgment, to wit:

Be it remembered that, the above entitled causes coming on for trial and hearing in its regular order on this, the — day of October, 1915, the same being one of the days of the regular October, 1915, Term of said Court, the Honorable D. F. Coyle being the sole presiding judge, and the plaintiffs in each of said above entitled causes appearing in person and by their attorneys of record, T. F. Lynch and Kenyon, Kelleher, O'Connor & Price, and the defendants, Board of Supervisors of Pocahontas County, Iowa, W. P. Hopkins,
141 J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klien, members of the Board of Supervisors of Pocahontas County, Iowa, L. O'Donnell, as Auditor of Pocahontas County, Iowa, John Forbes, County Treasurer of Pocahontas County, Iowa, and Drainage District Number 29, appearing by their attorney of record, F. C. Gilchrist, and S. F. Hiatt and the Katz-Craig Contracting Company appearing by their attorney of record, Robert Healy, and evidence having been offered and introduced in support of the averments of plaintiffs' petition and of the issues herein tendered and joined, and by agreement of the parties hereto, made and entered of record, this cause was submitted to the Court, to be decided in vacation, as of the last day of the October, 1915, Term of the said Court; and now, on this 26th day of March, A. D. 1917, the Court, being fully advised in the premises, Finds and Determines as follows, to wit:

1. That Plaintiff's petitions, and all amendments thereto, are without equity.

2. The Court finds and determines that the equities of this cause are with the defendants.

3. That the defendant, Board of Supervisors, has complied with all of the requirements of law in reference to the cleaning of the ditch referred to in the Plaintiffs' petitions, and that the defendant, S. F. Hiatt, has complied with his contract, made with the defendant, Board of Supervisors, in reference to the cleaning of said ditch.

4. That there is now due and owing from said Drainage District to the defendant, S. F. Hiatt, for said work, as aforesaid, the sum of Eight Thousand, Two Hundred Sixteen and 48-100 Dollars ($8,216.48).

It is therefore ordered, adjudged and decreed by the Court
142 that the temporary writ of injunction heretofore issued in these causes is hereby dissolved and dismissed; that the petitions of the plaintiffs, and all amendments thereto, are hereby dismissed; that the defendants, Board of Supervisors, and the County Auditor of Pocahontas County, Iowa, are hereby authorized and instructed to immediately and forthwith comply with the terms of the contract heretofore made with the said S. F. Hiatt, as aforesaid,

and to pay the said S. F. Hiatt the sum of Eight Thousand, Two Hundred Sixteen and 48-100 Dollars ($8,216.48).

All costs incurred herein, amounting to One Hundred Seventy-two and 72-100 dollars ($172.72), are taxed to the plaintiffs.

There is reserved, however, to the plaintiffs, the right, at any time within six months from the filing of this decree, to petition this court to set aside this decree.

To each and all of the foregoing, the plaintiffs except.

D. F. COYLE,
Judge of the 14th Judicial District.

The said above judgment entry and decree was filed in the office of the Clerk of the District Court of Pocahontas County, Iowa, on April 18, 1917, and was duly entered and made of record, and said judgment and decree was made and entered of record on the said date.

Certificate.

On the 25th day of August, 1917, the plaintiffs duly perfected an appeal to the Supreme Court of the State of Iowa, and duly
143 served notice of appeal upon all the attorneys of record for the defendants, and upon W. E. Bollard, Clerk of the District Court of Pocahontas County, Iowa, and filed said notice with the Clerk of said Court. That said notice of appeal was in due form of law, and the said plaintiffs fully, and in all respects, perfected said appeal according to law.

The transcript and depositions and shorthand notes of the evidence were duly filed with the Clerk of the District Court of Pocahontas County, Iowa, on the 20th day of October, 1915, said transcript and shorthand notes and depositions being duly and properly certified to by the presiding Judge, and the Reporter, in accordance with law. And said certified notes were duly translated by E. R. Coffin, who was agreed upon by the parties to take the testimony, and the following certificate was by him attached to said depositions and evidence:

STATE OF IOWA,
Pocahontas County, ss:

I, E. R. Coffin, hereby certify that the above and foregoing deposition- of the above and foregoing named witnesses, that is Ed Carter, Fred Peterson, Ed Rathbun, Alex Peterson, Ed Korf, Fred Duitsman, C. F. Linnan, William Breiholz, P. S. Peiffer, John E. Jordan, J. W. Clancey, J. A. Moeller, J. L. Parsons, S. F. Hiatt, G. P. Smith, John Forbes, A. L. Thornton, S. F. Moeller, George W. Day, Louis O'Donnell, and Mr. Dooley, same being contained in two volumes, marked one and two, were duly taken down by me in shorthand and the same has been duly and correctly extended into long-
hand. That the extension of my shorthand notes of the
144 depisitions of said witnesses is and constitute- the foregoing depositions. I hereby certify and return that the taking of said depositions, that the respective parties to his controversy

did waive the necessity of the said witnesses, signing the shorthand notes and the signing of said notes extended into longhand.

I certify and return that the above and foregoing depositions correctly show each and every question asked of said witnesses by the respective parties hereto, and the same is and constitutes a full, true and complete transcript of the records in all the proceedings had in taking said depositions of the witnesses.

I further state that each of the witnesses were, prior to the taking of the depositions as aforesaid, duly sworn as by law provided and I further certify and return that the taking of the oath provided by the statute to be administered to the shorthand reporter was duly waived by the respective parties hereto.

I further certify that each and all of the exhibits referred to in the testimony of said witnesses were marked by their respective identification marks as shown on said exhibits and the same are now in the hands of George W. Day, Pocahontas, Iowa, being part of the depositions of said witnesses.

E. R. COFFIN.

Subscribed and sworn to before me this 26th day of May, 1915.

F. D. DAVIS,
Notary Public.

145 *Certificate of Counsel.*

We hereby certify that the above and foregoing Abstract of the Record is a full, true and correct abstract of the record of the trial of this case. That it contains all the evidence offered and all the evidence introduced on the trial of the said cause, together with all objections, rulings and exceptions thereto, and fully sets forth the pleadings and exhibits and judgment entries and decree, and the appeal and all other matters which are of record in said cause, including all evidence taken, all pleadings filed, reference to all exhibits introduced properly identified, all rulings made, all objections made, and all exceptions taken.

T. F. LYNCH,
Attorney for Appellants.

We hereby certify that the actual cost of printing the foregoing abstract of record is in the sum of 65 cents per page.

T. F. LYNCH,
KENYON, KELLEHER, PRICE & HANSON,
Attorneys for Appellants.

Notice of Oral Argument.

Notice is hereby given that counsel for appellants will ask to be heard orally in argument upon the final submission of this cause in the Supreme Court.

T. F. LYNCH,
KENYON, KELLEHER, PRICE & HANSON,
Attorneys for Appellants.

146 In the Supreme Court of Iowa, May Term, 1919.

[Cut of Seal.]

WM. BREIHOLZ et al., Appellants,

vs.

BOARD OF SUPERVISORS et al., Defendants.

Cause No. 32531. In Equity.

Appeal from Pocahontas County District Court.

Honorable D. F. Coyle, Judge.

T. F. Lynch and Kenyon, Kelleher & Hanson, Attorneys for Appellants.
F. C. Gilchrist and Healy & Faville, Attorneys for Appellees.

Appellees' Additional Abstract.

Service of the within Additional Abstract is accepted this — day of May, 1919.

____ ____,
Attorney for Appellants.

147 The appellee deems the Abstract incorrect, and files this Additional Abstract accordingly, to correct the same.

The witness S. F. HIATT testified in addition to what is shown in the Abstract as follows:

Other bidders were present (at the time of the letting to witness of the contract), and I think other bids were placed with the Board. The work is more expensive in a clean-out, as the yardage is smaller per hundred feet, and it is shallow.

And concerning the use of dynamite on the clean-out, this witness testified: We used a half a dozen shots of dynamite. Probably only five or six yards of original dirt was removed by this in Branch A. We used one or two shots on Mercer's land, and this loosened probably four or five yards of dirt. Dynamite used in the fall was for the purpose of loosening the dirt washed in or the frozen dirt—to break the crust. With the exception of the two times when we removed five or six yards of solid earth, generally speaking I will say that we did not clean out or remove dirt that had not been excavated or removed from the ditch at the time of the original construction.

There was not included in this $10,500 (the sum of the warrants that had been issued to witness page 110 ab.) any cost for the removal or excavation of any dirt which was not required to be excavated under the construction instructions and cuts furnished by

Warrington, the engineer. The rotten banks break loose, and the water comes in and we have to throw it out. A ditch that is twenty feet wide washes until it is thirty and you throw it out and get pay for twenty.

Branch "A" had practically filled up when I started the clean-out. The lower part of the main ditch had filled in three and a half feet deep of silt. It was in bad shape and would not carry off the water or drain the land because it was filled. The tiles were submerged.

I did the digging in Calhoun county because it was an advantage to me and gave a good fall behind my machine as I went up stream. I did this for my own benefit and did not get pay for the yardage excavated there, and it was not included in the warrants issued to me. The outlet into Cedar Creek was 200 feet over into Cal-

148 houn county.

I left the culvert on the north side of the Busby land when I came back with the clean-out exactly as it was before the clean-out.

In case a different kind of machine had been used than mine they would have had to remove five bridges beside the railroad bridge. The Thomas bid was higher than mine.

Testifying concerning the width of Branch "A" (page 112 Ab.) witness stated (lines 14 and 15) that the original bottom width was four feet "by what the profile was, but it was made wider than that." And at line 20 and 21 (page 112) witness said that he went on conditions of the ditch regardless of the cuts "as there are certain places in the ditch that the banks cave and we take out all that fills—all required to come out."

I probably read the report Warrington had filed. He told me that it was all filled up. The yardage I claim in Branch A is not yardage that was not contemplated when the contract was made.

I figured that if I did not get pay for what I did they would have a good ditch anyway (line 30, p. 115). I told the engineer that I went there (the bottom 200 feet in Calhoun county) for my own benefit. Ditch 29 did not go to the line.

At the time of the bidding witness did not testify as stated in lines 11 and 12 p. 118 but did state that there was quite a crowd present at the letting, could not say just who was there. I had been to many lettings and saw many bidders and did not pay attention.

The work I did was reasonably necessary to keep the ditches repaired and from falling away and from filling up. I gave a bond to secure Exhibit X (contract).

The word "not" should be stricken from line 19 on page 119. I can tell mighty close as to whether the engineer is treating me fairly or not. I did not dig Branch "A" deeper than it had been originally on the north of the Busby place. When I got thru with the clean-out work the branch and the main was not any wider than immediately after the original construction except where it caved in and where sand and wash-outs—such as that.

149 On page 82 lines 6 and 7 the witness Hiatt was asked "How much deeper did you dig than the original," and he replied "Now do you mean the grade line—whether we went below grade line" and then said "Well if we went deeper than the grade line we probably went a foot below." "We dug to the grade line the engineer

gave us. Do not think there was much difference between the original grade line and the grade line he gave us."

On page 82 line 28 the witness said "That was caused in that particular case because we were going to lower the grade line." And at line 32 page 82 he testified that there would be very little dirt removed for the first time under the clean-out (second contract), very little except what come under the "first" specifications of the ditch—just possibly what was dynamited—we dynamited for probably fifty feet.

In speaking of the silt removed (page 84 line 3) he said, "It averaged, I think, more than a foot, to make an estimate it would be three and a half feet."

The witness J. A. MOELLER stated on cross-examination page 86 line 21 et seq. as follows: "I never offered any Board of Supervisors to take a contract as they offered it to the public, and I am never going to if they don't come to my ideas. My bids are always offered on the basis of being figured according to Moeller Brothers' table of over-cuts. The time they accepted one of my bids they got into a dispute about what I meant."

And at line 14 page 87 there seems to have been very poor abstracting inasmuch as the witness testified that the yardage referred to was about 4,000 or 5,000 yards in the lower and 15,000 yards above of absolute new construction. We got 20.24 for the whole job about three-fourths of a mile long. I don't know whether Horton & Mosely had their dredge on the ditch right at the place the work was to commence.

The witness G. P. SMITH, Drainage Engineer, testified: It would be necessary in order to preserve the drainage of the lands in the district to keep the mains open. I would not consider thirty cents as an excessive price for this work.

The cost of Branch "B" served by the plaintiffs had been
150 originally reduced. All of plaintiffs except one are on Branch B, and this branch was not assessed enough in the original assessment to pay its own cost. It lacked $1,250.00 of paying for itself. Branch B under the Skeels assessement did not help to pay any part of the main. They could not have outletted Branch B without first building the main. It was necessary for Branch B. The lands tributary to the lower main were assessed $27.223.00, whereas they should have been assessed only some $16,000.00.

With regard to the over-payment to the Katz-Craig Contracting Company spoken of in the pleadings and the record it was stipulated on the trial that the Board of Supervisors, acting for the district, had instituted a suit for the recovery of this over-payment and that said action had been prosecuted to judgment for the over-payment and interest from which an appeal was then pending in the Supreme Court of Iowa. (See now County of Pocahontas vs. Katz-Craig Company 181 Iowa, 1313.)

Certificate.

I hereby certify that the foregoing is a true and correct Additional Abstract of the record in this case and that the actual cost of printing it was the sum of $6.75.

F. C. GILCHRIST,
Attorney for Appellees.

151 In the Supreme Court, May Term, 1919.

569—32531.

WILLIAM BREIHOLZ and Others, Appellants,

vs.

BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA, and Others, Appellees.

Appeal from Pocahontas District Court.

D. F. Coyle, Judge.

July 10, 1919.

Action in Equity for the Cancellation of Assessments Levied upon the Lands of the Plaintiffs for the Alleged Expense or Cost of Maintenance, Cleaning and Repairing Certain Drainage Ditches.

On trial the District court dismissed the bill and plaintiffs appeal.

Affirmed.

T. F. Lynch and Kenyon, Kelleher and Hanson, for appellant.
F. C. Gilchrist and Healy and Faville, for appellees.

WEAVER, *J.*:

Much is said in the pleadings that is not necessary to an understanding of the issues in this case. Briefly state, it is conceded or shown without controversy that in the year 1907, a Drainage District, known as "No. 29" was established in Pocahontas County and the district was improved by the construction of a drainage system composed of a certain main with other laterals or branches. While some of these drains were of the closed or tile pattern, a large proportion thereof was open. In the year 1910, the engineer in charge of the district reported to the board of supervisors that a certain portion of the open main ditch, and one or more of the branches, had become filled with silt or sediment to an extent making it necessary or proper to clean the obstructed channels. He estimated the necessary excavation at 5500 yards. Nothing seems to have been done with reference to this report during
152 that year or until March, 1911, when the engineer brought up the subject anew, but this time recommending a more

extensive cleaning and repairing of the open ditches in the district and estimating the entire excavation at about 4500 cubic yards. Acting on this report and approving it, the board voted to employ S. F. Hiatt to do the work, being approximately 7317 yards at 30 cents in the upper part of the district, 36104 yards at 28 cents in the lower part and 936 yards in what is known as "Branch A." A contract to this effect was then made between the County Auditor and Hiatt. The letting of the contract was not advertised and was not offered for bids. Proceeding under the contract, Hiatt performed the work, and the cost or expense so incurred was, by order of the board, assessed against all the lands within the district in proportion to their assessment for the original construction of the system. The plaintiffs own tracts of land affected by this assessment and bring this action to have the same adjudged invalid and the lien thereof vacated and removed.

Hiatt was made a defendant and by proper pleading he asked that his right to the agreed compensation be confirmed. The theory upon which plaintiffs demand relief is that, the work actually contracted for and performed was not in any proper sense of the term, a work of repair upon the existing system, but rather in the nature of an original or independent improvement which the supervisors could not lawfully establish or order except upon notice to the property owners, nor lawfully contract for its construction except upon due advertisement and upon competitive bids.

And this, in brief, is what we understand to be the central proposition upon which the result of this litigation turns.

The trial court after hearing the evidence, entered a decree adjudging the equities to be with defendants; that the board of supervisors had complied with the law in letting the contract to Hiatt, and that Hiatt had performed his part of the agreement and was entitled to a compliance with such contract on part of the board of supervisors and County Auditor.

To ascertain the nature of the work contemplated, we
153 turn to the written contract entered into with Hiatt and find it there recited that he agreed "to deepen, clean, reopen and repair said Drainage District No. 29 from Station Zero to Station 37 in the manner and to the proportionate depth and width as specified in the report of W. B. Warrington filed March 11, 1911; and from Station 37 to Station 87; from Station 87 to Station 170; from Station 170 to Station 250, the above approximating about 35168 yards herein called the lower end of said district; also in addition to the above work in the lower end of the district, the second party agrees to clean, reopen and repair Branch A from Station Zero to Station 23—approximating 936 cubic yards—and to clean, reopen, deepen and repair said drainage improvement from Station 402 to Station 500, approximating about 7317 cubic yards and herein called the upper end of said district." Other provisions of the writing relate to matters of detail not bearing materially upon the issues in the case.

The engineers report and recommendation upon which the board acted in letting the contract does not appear to be em-

bodied in the record and the engineer making it being since deceased, we do not have the advantage of his testimony, but it may be presumed that the contract as made with Hiatt is in substantial accord with such recommendation. The work was done under the supervision of the county's engineer and the testimony tends to show that in so doing, the contractor not only took out the sediment with which the ditches had, to a greater or less extent, become filled or obstructed, but, under the direction of the engineer or in pursuance of the plans furnished by him, the contractor also, in certain places, increased the depth of the excavation below its original grade and in other places sought to insure greater permanency of the banks of the ditch by increasing their slope and to that extent increased the original width of the channel. There is also evidence of some original excavation at the outlet.

It further appears that the contractor extended an excavation beyond the district limits a short distance in order to facilitate the successful operation of the drainage system, but for this work
154 he testifies he neither asked nor received compensation and his statement does not appear to be disputed.

The witnesses generally agree that the ditches had become filled and obstructed to a degree rendering it necessary or at least appropriate that they should be cleaned out and repaired if they were to be of real benefit to the lands of the district, and it is also reasonably certain that when this work was completed, the ditches were in part, at least, somewhat deeper and wider than they were as originally constructed. No witness undertakes to say that the work done was uncalled for, or did not constitute a substantial betterment of the drainage system, but there is some evidence to the effect that the compensation to the contractor, as fixed in the agreement, was in excess of its fair value. The charge in the plaintiff's petition and repeated in argument that the work contracted for and done included a lengthening or extension of the ditch or ditches beyond their original dimensions is not justified by the record, but as we have said it is to be conceded that the channels were not only reopened, cleaned and emptied of silt and obstructions, but were in part, to some extent, materially deepened.

Such being in part the nature of the work contracted for and done, the material legal inquiry is whether under the provisions of the statute, the board was authorized to undertake it without notice to the property owners, or to let the contract except upon competitive bidding.

If we will bear in mind that this work here done was in a drainage district, the organization of which had been perfected for several years and that the drainage improvements contemplated in such organization had been fully completed long before the extension of this contract to reopen, clean and deepen the ditches, there need be no doubt or confusion as to the effect of the statute. The misunderstanding which seems to have existed concerning the provisions of Code Supplement, sections 1989-*a*11 and 1989-*a*21 and to which perhaps a decision or two by this court has contributed, has arisen

by failure to notice the distinction between the conditions
155 calling for their application.

The first of these sections, 1989-*a*11, prescribing the procedure to be followed when after the establishment of the district, "and before the completion of the drainage improvement therein," it becomes apparent that a levee or drain should be enlarged, deepened, or otherwise changed, the board may authorize such change by resolution, subject to the provision that if such change operates to increase the burden upon any property, notice of the proposed alteration shall be given the owner or owners so affected an opportunity afforded them to present their claims for damages.

But by the other section, 1989-*a*21, provision is made for the maintenance and care of the drainage system after the "district shall have been established and the improvement constructed." For that purpose it is there provided that the improvement "shall at all times be under the control and supervision of the board of supervisors and it shall be the duty of the board to keep the same in repair" and for that purpose "they may cause the same to be enlarged, reopened, deepened, widened, straightened, or lengthened for a better outlet." The cost of such repairs and changes are to be paid from the drainage fund of the district or by assessing it upon the lands in the same proportion that the cost of the original construction was assessed—except where additional right of way is taken and in such case the board must proceed as the statute provides for establishing an original improvement.

The reason for the distinction made by these sections is quite obvious. The first prevents any undue advantage being acquired over the property owners in the establishment of a district by laying out a plan of improvement to which they may be willing to accede and for which they may claim little or no damage and then, by a mere resolution of the board, increase their burden by adopting a materially different plan to which they have had no opportunity to object. A very different situation is presented, however, where a district has been fully organized and a system of drainage has been established and completed.

156 In the nature of things and especially with open ditches having but slight natural slopes or grades, the duty should rest upon some responsible officer or board to see that they are kept open and in repair, and if they do not work efficiently, to cause the removal of the difficulty, if practicable.

This responsibility, section 1989-*a*21 places upon the board of supervisors. The duty is one which is continuous, calling for supervision from day to day and month to month, or, in the language of the statute, "at all times." The work to be done may involve considerable expense or it may be a succession of petty repairs each of which is comparatively inexpensive. To require that in each case the board must advertise the job and seek the lowest bidder would be to hamper and prevent its efficient action without any corresponding benefit to the public. It is not at all strange that a drainage system once completed and put to practical use should develop here and there a defect, and if such defect can be remedied or the

efficiency of the system be increased by lowering the bottom of the channel at some point or by widening the cut in another place the right of the board to which the duty of care and maintenance is committed, to do what ought to be done to that end, ought not to be unreasonably restricted.

The contract between the board and Hiatt to which the plaintiffs object, appears to be fairly and clearly within the scope of the power and responsibility conferred by this section. Even if the terms of the contract be as broad and comprehensive as plaintiffs say they are, they are still not in excess of the authority expressly given to "enlarge, reopen, deepen, widen and straighten" the completed ditches for the purpose of keeping them in repair and maintaining them in efficient working order. The statute imposes no duty to give notice in advance of each separate work of repair, or to advertise the same for competitive bids—except, perhaps, as may be implied in the proviso at the end of the section which seems to recognize such necessity where additional right of way is to be taken and this res-
157 ervation is sufficient, in our judgment, to obviate any possible objection on constitutional grounds.

Appellants place chief reliance upon the decision by the court in Lade v. Board, 166 N. W. 586, and in candor we must say that if we are to construe some of the language there employed according to its literal terms, as a statement of the law as it now exists, it is out of harmony with the views hereinbefore expressed. For example the opinion in the cited case says that, "While it is true the board of supervisors has the authority to have an existing ditch widened and deepened, and make the assessment for the cost thereof, this may only be done if notice be given, and none was given. See Code Supplement, section 1989-*a*11 as amended by section 10, chapter 118, 33 G. A., and section 4 of chapter 87, 34 G. A."

Now if the assessment which was there under consideration were made while the amendment provided by section 10 of chapter 118, 33 G A, was in force the statement as to the effect of such amendment to invalidate that assessment need not be questioned, but by a later amendment which is embodied in the present Code Supplement of 1913 the section referred to, 1989-*a*11, is expressly limited to changes sought to be effected in the dimensions and location of the ditch after the district is established "and before the completion of the drainage improvements therein," and does not in any manner supersede Code Supplement, section 1989-*a*21, or limit or control the authority which that section vests in the supervisors

Complaint is further made that all of the lands in the district were not benefited alike or in the same proportion and the assessments are therefore inequitable. There is no merit in the objection. The drainage system once established and completed is an improvement from which the district as a whole is conclusively presumed to receive a benefit and the statute expressly provides for the manner of the assessment of the expense of repair and the law in this respect appears to have been followed. A public school house, for example, may be of greater actual benefit to some property owners than to others, but the expenses for its construction, maintenance and re-

pair are chargeable in equal proportion to all the property
158 within the district boundaries

Nothing here said in any manner detracts from the right of the owner of property within the drainage district to object to an assessment for a new and independent drainage improvement which is sought to be imposed under the guise of a mere work of repair such as is authorized by section 1989-*a*21 That subject we have recently treated in the case of C. & N. W. Ry. Co. v. Harrison Co., decided at the May period of the present term of court and need not here be further dwelt upon.

The conclusions we have announced appear to us to be inevitable unless we are to judicially neutralize the plainly expressed will of the legislature. The decision of the trial court is therefore—

Affirmed.

Ladd, C. J., Gaynor and Stevens, JJ., concur.

159 Be it remembered that on the 10th day of July, 1919, the following proceedings were had in the Supreme Court of Iowa, to-wit:

WILLIAM BREIHOLZ et al., Appellants,

vs.

BOARD OF SUPERVISORS OF POCAHONTAS COUNTY et al.

Appeal from Pocahontas District Court.

In this cause, the Court being fully advised in the premises, file their written opinion affirming the judgment of the District Court.

It is therefore considered by the Court that the judgment of the Court below be and it is hereby Affirmed, and that a writ of procedendo issue accordingly.

It is further considered by the Court that the Appellant pay the costs of this appeal, taxed at $20.45 and that execution issue therefor.

I hereby certify that the foregoing is a full, true and complete copy of the judgment entry of said Court in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 7th day of October, A. D. 1919.

[Seal of the Supreme Court of Iowa.]

B. W. GARRETT,
Clerk Supreme Court,
By —— ——,
Deputy.

160 In the Supreme Court of Iowa.

WILLIAM BREIHOLZ, EDWARD KORF, JOSEPH STUART, MARY DOYLE, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitsman, J. M. De Vaul, Appellants,

vs.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA, W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klien, Members of the Board of Supervisors of Pocahontas County, Iowa; L. O'Donnell, as Auditor of Pocahontas County; John Forbes, County Treasurer of Pocahontas County, Iowa; S. F. Hiatt, and the Katz-Craig Contracting Company, Drainage District Number Twenty-nine (29), Pocahontas County, Iowa, Appellees.

Petition for Allowance of Writ of Error.

To the Honorable Scott M. Ladd, Chief Justice of the Supreme Court of Iowa:

Now come William Breiholz, Edward Korf, Joseph Stuart, Mary Doyle, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitsman, J. M. De Vaul, the above named plaintiffs and appellants, by their attorneys, Kelleher, Hanson & Mitchell, and complain and allege that they are land owners, owning land located in Pocahontas County, Iowa. That in the above entitled matter, on July the 10th, 1919, final judgment was rendered against your petitioners by the Supreme Court of the State of Iowa, that being the highest court of law or equity in the said state of Iowa, wherein it was adjudged that a judgment, theretofore rendered in favor of the defendants and against the plaintiffs in this cause by the District Court of Pocahontas County, Iowa, should be affirmed.

That, as is more fully shown by the record in this cause in
161 which said judgment of the Supreme Court of Iowa was rendered, there was duly established in 1907 what was known as Drainage District Number Twenty-nine (29), Pocahontas County, Iowa. That subsequently, and on or about June 8, 1911, the Board of Supervisors of Pocahontas County, Iowa, by resolution entered of record, ordered and authorized certain repairs and changes of the ditches constructed in said Drainage District Number Twenty-nine (29). That on or about June the 9th, 1911, the Board of Supervisors of Pocahontas County, Iowa, entered into a contract with the defendant, S. F. Hiatt, whereby the said Hiatt agreed to deepen, clean, re-open and repair certain parts of said Drainage District Number Twenty-nine (29) for the agreed sum of Eleven Thousand Dollars ($11,000.00). That the plaintiffs had no knowledge of the action of the Board of Supervisors in passing said resolu-

tion and in making said contract, nor were they ever served with any notice of such action or afforded an opportunity to be heard on the matters involved in said resolution and contract. That no notice was ever given inviting bids on the work contemplated by the resolution and that the contract was not let to the lowest bidder, but was awarded to and entered into with the said Hiatt without notice, at an exorbi*d*ant and unconscionable amount and rate of compensation. That the said Hiatt thereupon proceeded to enlarge and change, by deepening, widening and lengthening the ditches and drains in said Drainage District Number Twenty-nine (29), beyond the original plans and specifications, and that the plaintiffs, land owners of said district, had neither notice nor knowledge thereof until after the construction of the same. That warrants were issued by the county auditor to the contractor, Hiatt, in payment of the work, and that the assessments were levied against the lands of the plaintiffs, and, not being paid, went to bond. That the improvements, as made,
162 did not benefit the lands of the plaintiffs. That the plaintiffs are deprived, by reason of the assessment which is a lien on their land, of their property without due process of law, contrary to the constitution of the United States, and in particular, contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States. And, furthermore, that Section 1989-*a*-21 of the 1897 Code of Iowa, as amended, was in contravention of, and in violation of, the Fifth and Fourteenth Amendment to the Constitution of the United States.

Whereupon, it was adjudged by the Supreme Court of Iowa, in its final judgment in the above entitled matter, that the contractor did increase the depth of the excavation below its original grade, and increased the slope of the banks and increased the original widths of the channel and made an original excavation at the outlet, which extended the excavation beyond the limits of the original drainage district.

It was also adjudged by the said Supreme Court of Iowa, in its final judgment in the above entitled matter, that code section 1989-*a*-21 governed the proceedure in this cause and that a Board of Supervisors, under and by virtue of said section, had the right to cause the drains of an existing drainage district to be enlarged, re-opened, deepened, widened, straightened, or lengthened for a better outlet, without giving land owners notice of the action, and that a Board of Supervisors had the right, under said statute, to let said contract without competitive bids and that Code Section 1989-*a*-11, which provided for notice of the proposed alterations in a drainage district wherein it was proposed to enlarge, deepen or otherwise change the ditches of drain, had no application. It was also adjudged by the said Supreme Court of the State of Iowa, in its final judgment in the above entitled matter, that the said Code Section 1989-*a*-21 did not violate any of the provisions of the Constitution of the United States.

163 Your petitioners further show that the said judgment of said Supreme Court of Iowa was, and is, a final judgment of

the highest Court of the State of Iowa in which a decision in said suit could or can be had. That the said original judgment was rendered and was filed in the Supreme Court of Iowa on July 10, 1919.

Petitioners further show that the said judgment is repugnant to and in violation of the Constitution and laws of the United States, and particularly to Article Fourteen to the Constitution of the United States, which provides that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law;" and to Article Five of the Amendments of the Constitution of the United States, providing that: "No person shall be * * * deprived of * * * property, without due process of law; nor shall private property be taken for public use without just compensation."

And a Federal question was made in said cause, to-wit, as hereinbefore set out, and that said judgment of the said Supreme Court of Iowa adjudges and determines that in a case wherein a drainage district has been established, that a Board of Supervisors, acting for and in behalf of such drainage district, may, without notice of any kind or character to an owner of lands within said drainage district, let a contract for the deepening, widening, straightening, lengthening, enlarging or re-opening of drains in said drainage district, and assess the cost thereof on the lands within the district on the basis of the original assessment for the construction of the drainage district, and without notice of either the intention to let the contract, the letting of the contract, or of the assessment to be levied to pay
164 for the cost of such additional improvement to the original improvement; that a Board of Supervisors is authorized so to do under and by virtue of the Code of Iowa, Section 1989-*a*-21, and that such section governs and that that section does not contravene or violate the constitutional provisions of the Constitution of Iowa and the Constitution of the United States; that Code Section 1989-*a*-11, which provides for notice and which states that: "whenever any change or changes are made under this said section 1989-*a*-21, or any other section of the chapter (said Section 1989-*a*-21, being one of the sections) notice shall be given," does not apply. That the said judgment and decision presents the Federal Question of the right of a Board of Supervisors to enlarge, re-open, deepen, widen, straighten, or lengthen an existing drainage ditch without notice of any kind or character to the land owners affected thereby, and the Federal question of the right of a Board of Supervisors to levy an assessment of such work without notice of any kind to the land owners affected thereby. That said decision of said Federal questions was necessary to the judgment rendered by the Supreme Court of the State of Iowa.

Wherefore, your petitioner — present an exemplified copy of the record of the Supreme Court of Iowa, and pray that a Writ of Error to the said Supreme Court of Iowa may be allowed; that Citation be granted and Writ of Error may — operated as a supersedeas, that the errors complained of may be reviewed in the Supreme Court of the

United States, and judgment aforesaid, in said Supreme Court of Iowa, be reversed.

165 WILLIAM BREIHOLZ, EDWARD KORF, JOSEPH STUART, MARY DOYLE, ALEX. PETERSON, J. W. CLANCEY, P. E. PEIFFER, JOHN E. JORDAN, CHARLES F. LINNAN, HENRY SMITH, GARLIES TWEEDALE, FRED DUITSMAN, J. M. DE VAUL,

By KELLEHER, HANSON & MITCHELL,
Their Attorneys.

DENIS M. KELLEHER,
CLARENCE M. HANSON,
RICHARD F. MITCHELL,
Counsel.

The Writ of Error, as prayed for in the foregoing petition, is hereby allowed this 3rd day of October, A. D. 1919, the Writ of Error to operate as a supersedeas, and the Bond for that purpose is fixed in the penal sum of One Thousand Dollars ($1,000.00).

SCOTT M. LADD,
Chief Justice of the Supreme Court of Iowa.

166 [Endorsed:] Causes No. 4130 and 4152. Equity. Petition for Allowance of Writ of Errors.

167 In the Supreme Court of Iowa.

WILLIAM BREIHOLZ, EDWARD KORF, JOSEPH STUART, MARY DOYLE, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitsman, J. M. Devaul, Plaintiffs and Appellants,

vs.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA; W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klein, Members of the Board of Supervisors of Pocahontas County, Iowa; L. O'Donnel, as Auditor of Pocahontas County, Iowa; John Forbes, County Treasurer of Pocahontas County, Iowa; S. F. Hiatt, and the Katz-Craig Contracting Company, Drainage District Number Twenty-nine (29), Pocahontas County, Iowa, Defendants and Appellees.

Assignment of Error.

Now come the plaintiffs and appellants and make and file this, their assignment of error:

1. Section 1989-*a*-21, of the Code of Iowa in so far as it attempts to clothe the Board of Supervisors with ex parte power and authority to enlarge, by widening, deepening and lengthening a ditch theretofore constructed, is unconstitutional and void by reason of its failure to provide some kind of notice to those who are required, by

statute, to defray the expense of the improvement, or afford an opportunity, at some state of the proceedings, to be heard upon all questions necessary to be determined in order to justify the proposed work, and the Supreme Court of Iowa, in failing to so hold and adjudge, committed manifest error.

2. The Supreme Court of Iowa, in holding and adjudging
168 that no notice was requisite in proceedings had under section 1989-*a*-21 of the Code of Iowa, erred in holding and adjudging that said section was not unconstitutional and void as depriving those against whom assessments are made of their property without due process of law.

3. The statute, Section 1989-*a*-21 of the Code of Iowa, is not limited to mere ordinary repa*ir*s of an existing ditch. It not only authorizes repairs, but grants to a Board of Supervisors the further power to enlarge the ditch by widening its bank or deepening its channel, and, respecting this additional power, it contains no limitation respecting the extent to which the board may go. The Supreme Court of Iowa, therefore, in holding that section 1989-*a*-11 of the Code was not to be read in connection with section 1989-*a*-21, so as to require notice under section 1989-*a*-21, erred in holding and adjudging that said section 1989-*a*-21 was not unconstitutional and void.

4. In as much as section 1989-*a*-21 of the Code, as construed by the Supreme Court of Iowa, does not require notice, and authorizes and empowers a Board of Supervisors to enlarge a previously constructed dit*h*c by widening its banks and deepening its channel and even extending the ditch beyond its original construction, it is unconstitutional and void, for the reason that it contains no provision for notice to interested parties or otherwise affords them an opportunity to be heard, and the Supreme Court of Iowa, in not so holding, committed manifest error.

5. Code Section 1989-*a*-21, as administered and construed by the Supreme Court of Iowa, directly violates and infringes the provisions of the Constitution of the United States in that the Supreme Court of Iowa holds and adjudges that no notice need be given to interested landowners of a deepening, widening and lengthening of an existing drainage ditch, and that an assessment may be
169 levied to defray the costs thereof without notice or an opportunity to be heard, and by reason thereof the Supreme Court of Iowa committed manifest error in so adjudicating the claims of the plaintiffs.

6. The Board of Supervisors were without power to make a contract for the purpose of deepening, widening, lengthening, enlarging and repairing of a ditch which had already been constructed, and to assess the cost thereof against *y*he land owners within the district, without giving notice, and the Supreme Court of Iowa, in holding and adjudging to the contrary, committed manifest error for the reason that the land owners were deprived of their property

without due process of law, contrary to Articles 5 and 14 of the Constitution of the United States.

7. The work done under the contract in this case was not a mere cleaning and repairing, but was widening of the banks and a deepening of the channel of the existing drainage ditch and therefore of a character requiring notice to be given to the land owners affected, and no notice having been given, the land owners were deprived of their property without due process of law. And the Supreme Court of Iowa committed manifest error in holding that the land owners were not entitled to a hearing or notice of the letting of the contract and of the assessment made thereunder.

8. The levy of the assessment against the lands of the plaintiffs, to pay for the construction of the work provided for in the contract, was void, and the county treasurer, in attempting to sell the lands of the plaintiffs for delinquent taxes, was without authority so to do, and the Supreme Court of the State of Iowa, in adjudging to the contrary, committed manifest error to the prejudice and rights of the plaintiffs, under and by virtue of the Constitution of the United States.

170 9. The tax and assessment, as levied by the Board of Supervisors of Pocahontas County, Iowa, and spread upon the tax records, is void and should have been ordered cancelled, and the collection thereof enjoined for want of any notice, and for failure to afford the tax payer an opportunity for hearing upon the question of subjecting his property to such tax and assessment, the same being levied and assessed for a substantially and materially altered, widened, deepened and enlarged drainage improvement, without due process of law, and contrary to Articles Five and Fourteen of the Constitution of the United States. And the Supreme Court of Iowa, in so failing to hold and to reverse the action of the trial court, committed manifest error.

10. Section 1989-*a*-21, as administered and justified by the Supreme Court of the State of Iowa, is unconstitutional and void for the reason it affords to interested land owners no opportunity whatsoever to file claims for damages. And the Supreme Court of the State of Iowa, in not so holding, committed manifest error.

11. Section 1989-*a*-21, as construed, administered and applied by the Supreme Court of Iowa, does not provide an opportunity to land owners affected, to file objections to assessments levied against their lands, and, by reason thereof, contravenes the provisions of Articles Five and Fourteen of the Constitution of the United States. And the Supreme Court of the State of Iowa, in not so holding, committed manifest error.

12. Section 1989-*a*-21, as construed, administered and applied by the Supreme Court of the State of Iowa, fails to provide for any right of appeal to the interested land owners, and, by reason thereof, violates Articles Five and Fourteen of the Constitution of the United States. And the Supreme Court of Iowa, in not so holding, committed manifest error.

13. The assessment for the original construction of Drain-
171 age District Number Twenty-nine (29), having been levied as a unit and spread over the district without reference to the benefit received, contrary to the Statutes of Iowa, and the same method and classification having been used in spreading the assessment for the work done under the contract complained of, there was, by reason thereof, a taking of property without reference to the benefits received and without due process of law, and contrary to the Constitution of the United States. And the Supreme Court of the State of Iowa, in not so holding, committed manifest error.

14. The Board of Supervisors of Pocahontas County, Iowa, having levied an assessment to cover the cost of construction under the Hiatt contract, and which assessment was for work of construction done outside of Pocahontas County, as well as within Pocahontas County, Iowa, the assessment was void for want of jurisdiction, and the Board of Supervisors, in levying the assessment to pay for work, some of which was work done outside of the territorial limits of the county, therefore violated the Constitution of the United States. And the Supreme Court of the State of Iowa, in not so holding, committed manifest error.

DENNIS M. KELLEHER,
CLARENCE M. HANSON,
RICHARD F. MITCHELL,
Attorneys for Plaintiffs in Error.

KELLEHER, HANSON & MITCHELL,
Of Counsel.

Duly filed with petition for writ of error, this 3d day of October, A. D., 1919.

SCOTT M. LADD,
Chief Justice of Supreme Court of Iowa.

172 In the Supreme Court of Iowa.

WILLIAM BREIHOLZ, EDWARD KORF, JOSEPH STUART, MARY DOYLE, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitsman and J. M. De Vaul, Plaintiffs and Appellants,

vs.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA; W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klein, Members of the Board of Supervisors of Pocahontas County, Iowa; L. O'Donnell, as Auditor of Pocahontas County, Iowa; John Forbes, County Treasurer of Pocahontas County, Iowa; S. F. Hiatt, and the Katz-Craig Contracting Company, Drainage District Number Twenty-nine (29), Pocahontas County, Iowa, Defendants and Appellees.

Order.

The above entitled matter coming on to be heard on this 3rd day of October A. D. 1919 upon the petition of the appellants therein for

a Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Iowa, and upon examination of said petition, and the record in said matter, and desiring to give the petitioners an opportunity to present in the Supreme Court of the United States the questions presented by the record in this matter

It is ordered that a Writ of Error be, and the same is hereby, allowed to this Court from the Supreme Court of the United States, and that the Bond presented by said petitioners be, and the same is hereby, approved.

SCOTT M. LADD,
Chief Justice of the Supreme Court of the State of Iowa.

173 [Endorsed:] In Equity. Causes Nos. 4130 and 4152. William Breiholz et al. vs. The Board of Supervisors of Pocahontas County, Iowa, et al.

174 Know all men by these presents:

That we, William Breiholz, Edward Korf, Joseph Stuart, Mary Doyle, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitsman, J. M. De Vaul, as principals, and United States Fidelity and Guaranty Company of Baltimore, Md., as surety, are held and firmly bound unto The Board of Supervisors of Pocahontas County, Iowa, W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klein, Members of the Board of Supervisors of Pocahontas County, Iowa; L. O'Donnell, as Auditor of Pocahontas County, Iowa, John Forbes, County Treasurer of Pocahontas County, Iowa; S. F. Hiatt, and Kratz-Craig Contracting Company, Drainage District Number Twenty-nine (29), Pocahontas County, Iowa, in the sum of One Thousand Dollars ($1,000.00), to be paid to the said obligees, their successors, representatives and assigns, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators jointly and severally by these presents. Sealed with our seals and dated this 3rd day of October, A. D. 1919.

Whereas, lately at the May Term, A. D. 1919, of the Supreme Court of the State of Iowa, in a suit pending in said Court between William Breiholz, Edward Korf, Joseph Stuart, Mary Doyle, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitsman, J. M. De Vaul, plaintiffs and appellants, and The Board of Supervisors of Pocahontas County, Iowa, W. P. Hopkins, J. A. Crummer, C. Nolan,
M. J. Dooley, and R. Klein, Members of the Board of Super-
175 visors of Pocahontas County, Iowa; L. O'Donnell, as Auditor of Pocahontas County, Iowa; John Forbes, County Treasurer of Pocahontas County, Iowa; S. F. Hiatt, and the Katz-Craig Contracting Company, Drainage District Number Twenty-nine (29), Pocahontas County, Iowa, Defendants and Appellants, judgment was rendered against the said William Breiholz, Edward Korf, Joseph Stuart, Mary Doyle, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred

Duitsman, J. M. De Vaul, Plaintiffs and Appellants, aforesaid, and the said plaintiffs having obtained a Writ of Error from the Supreme Court of the United States to reverse the judgment in the aforesaid suit, and a Citation directed to the said defendants, citing and admonishing them to appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, thirty (30) days from and after the date of said citation,

Now, the condition of the above obligations is such that if the said plaintiffs and appellants shall prosecute said writ to effect and answer all costs if it fails to make good said Writ of Error, then this obligation to be void, otherwise to remain in full force and effect.

Sealed and delivered in the presence of

WILLIAM BREIHOLZ,
EDWARD KORF,
JOSEPH STUART,
MARY DOYLE,
ALEX PETERSON,
J. W. CLANCEY,
P. E. PEIFFER,
JOHN E. JORDAN,
CHARLES F. LINNAN,
HENRY SMITH,
GARLIES TWEEDALE,
FRED DUITSMAN,
J. M. DE VAUL,
By KELLEHER, HANSON & MITCHELL,
By C. M. HANSON,
Their Attorneys.
UNITED STATES FIDELITY AND GUARANTY COMPANY,
By R. G. WELLMAN,
Attorney in Fact.

[Seal United States Fidelity & Guaranty Company, Incorporated 1896.]

Approved by
SCOTT M. LADD,
Chief Justice of the Supreme Court of Iowa.

176 [Endorsed:] In Equity. Causes Nos. 4130 and 4152. William Breiholz et al vs. The Board of Supervisors of Pocahontas County, Iowa, et al. Bond.

177 In the Supreme Court of Iowa.

WILLIAM BREIHOLZ, EDWARD KORF, JOSEPH STUART, MARY DOYLE, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedle, Fred Duitsman, J. M. De Vaul, Plaintiffs and Appellants,

vs.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA, W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klien, Members of the Board of Supervisors of Pocahontas County, Iowa; L. O'Donnell, as Auditor of Pocahontas County; John Forbes, County Treasurer of Pocahontas County, Iowa; S. F. Hiatt, and the Katz-Craig Contracting Company, Drainage District Number Twenty-nine (29), Pocahontas County, Iowa, Defendants and Appellants.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Iowa, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Iowa before you, or some of you, being the highest court of law or equity of said State in which a decision could be had in the said suit between William Breiholz, Edward Korf, Joseph Stuart, Mary Doyle, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedle, Fred Duitsman, J. M. De Vaul, Plaintiffs and Appellants, vs.
178 The Board of Supervisors of Pocahontas County, Iowa, W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klien, Members of the Board of Supervisors of Pocahontas County, Iowa; L. O'Donnell, as Auditor of Pocahontas County, Iowa; John Forbes, County Treasurer of Pocahontas County, Iowa; S. F. Hiatt, and the Katz-Craig Contracting Company, Drainage District Number Twenty-nine (29), Pocahontas County, Iowa, Defendants and Appellants, in which suit the said William Breiholz, Edward Korf, Joseph Stuart, Mary Doyle, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitsman, J. M. De Vaul, were the appellants, and The Board of Supervisors of Pocahontas County, Iowa, W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klien, Members of the Board of Supervisors of Pocahontas County, Iowa, L. O'Donnell, as Auditor of Pocahontas County, Iowa, John Forbes, County Treasurer of Pocahontas County, Iowa; S. F. Hiatt, and the Katz-Craig Contracting Company, Drainage District Number Twenty-nine (29), Pocahontas County, Iowa, were the appellees, wherein was drawn in question the validity of a treaty or statute or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an

authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Consti-
179 tution or of a treaty or statute *or*, or commission held under the United States, and the decision is against the title, right, privilege or assumption specifically set up or claimed under such clause of the said Constitution, treaty, statute, commission or authority; a manifest error hath happened to the great damage of the said William Breiholz, Edward Korf, Joseph Stuart, Mary Doyle, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitsman, J. M. De Vaul, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, *so* command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 3rd day of October, in the year of Our Lord, One Thousand Nine Hundred and Nineteen.

WM. C. McARTHUR,
Clerk of the District Court of
the United States for the
Southern District of Iowa,
By LOUIS J. ADELMAN,
Deputy.

Allowed by

SCOTT M. LADD,
Chief Justice of the Supreme Court of Iowa.

180 [Endorsed:] In Equity. Causes No. 4130 and 4152. William Breiholz, et al., vs. The Board of Supervisors of Pocahontas County, Iowa, et al.

181 WILLIAM BREIHOLZ, EDWARD KORF, JOSEPH STUART, MARY DOYLE, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitsman, J. M. De Vaul, Appellants,

vs.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA; W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klien, Members of the Board of Supervisors of Pocahontas County, Iowa; L. O'Donnell, as Auditor of Pocahontas County; John Forbes, County Treasurer of Pocahontas County, Iowa; S. F. Hiatt, and the Katz-Craig Contracting Company, Drainage District No. 29, Pocahontas County, Iowa., Appellees.

Præcipe.

To the Honorable B. W. Garrett, Clerk of the Supreme Court of Iowa:

You are hereby ordered in making up the transcript of the record in the above entitled cause to include the following portions of the record.

1. The appellants' abstract of record.

2. The appellees' amendment to appellants' abstract of the record.

3. The opinion and judgment of the Supreme Court of Iowa.

4. Petition for writ of error and allowance.

5. Assignment of errors including date of the filing of the same in the Supreme Court of Iowa.

6. Allowance of the writ of error.

7. Bond and approval thereof.

8. Writ of error.

9. Præcipe for record and service.

10. Citations in error and service thereof.

11. Certificate of the Clerk of the Supreme Court of Iowa to the said transcript.

182 12. Stipulation entered into with reference to the record.

KELLEHER, HANSON & MITCHELL,
Attorneys and Counsellors for
Plaintiffs and Appellants.

183 In the Supreme Court of Iowa.

WILLIAM BREIHOLZ, EDWARD KORF, JOSEPH STUART, MARY DOYLE, Alex. Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedle, Fred Duitsman, J. M. De Vaul, Plaintiffs and Appellants,

vs.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA; W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klien, Members of the Board of Supervisors of Pocahontas County, Iowa; L. O'Donnell, as Auditor of Pocahontas County, Iowa; John Forbes, County Treasurer of Pocahontas County, Iowa; S. F. Hiatt, and the Katz-Craig Contracting Company, Drainage District Number Twenty-nine (29), Pocahontas County, Iowa, Defendants and Appellees.

Citation.

UNITED STATES OF AMERICA, *ss:*

To the Board of Supervisors of Pocahontas County, Iowa, W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klein, Members of the Board of Supervisors of Pocahontas County, Iowa; L. O'Donnell, as Auditor of Pocahontas County, Iowa; John Forbes, County Treasurer of Pocahontas County, Iowa S. F. Hiatt, and the Katz-Craig Contracting Company, Drainage District Number Twenty-nine (29), Pocahontas County, Iowa; Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a Writ of Error filed in the Clerk's Office of the Supreme Court of the State of Iowa, wherein William Breiholz, Edward Korf, Joseph Stuart, Mary Doyle, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles
F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitsman,
184 and J. M. DeVaul, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Scott M. Ladd, Chief Justice of the Supreme Court of Iowa, this 3rd day of October, in the year of Our Lord One Thousand Nine Hundred and Nineteen.

SCOTT M. LADD,
Chief Justice of the Supreme Court of Iowa.

185 Service of the within Citation accepted, and a true copy thereof received this 4th day of October, A. D. 1919.

F. C. GILCHRIST,
Counsel of Record for The Board of Supervisors of Pocahontas County, Iowa; W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klien, Members of the Board of Supervisors of Pocahontas County, Iowa; L. O'Donnell, as Auditor of Pocahontas County, Iowa; John Forbes, as Treasurer of Pocahontas County, Iowa; Drainage District Number Twenty-nine (29), *Pocahontas County, Iowa.*

ROBERT HEALY AND HEALY & TONILLER,
Counsel of Record for the Defendants in Error, S. F. Hiatt, and Katz-Craig Contracting Company.

186 [Endorsed:] Equity Nos. 4130 and 4152. William Breiholz et al., vs. The Board of Supervisors of Pocahontas County, Iowa et al. Citation. Filed Oct. 7, 1919. B. W. Garrett, Clerk Supreme Court.

187 In the Supreme Court of Iowa.

WILLIAM BREIHOLZ, EDWARD KORF, JOSEPH STUART, MARY DOYLE, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitsman, J. M. De Vaul, Plaintiffs and Appellants,

vs.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA; W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klien, Members of the Board of Supervisors of Pocahontas County, Iowa; L. O'Donnell, as Auditor of Pocahontas County, Iowa; John Forbes, County Treasurer of Pocahontas County, Iowa; S. F. Hiatt, and the Katz-Craig Contracting Company, Drainage District Number Twenty-nine (29), Pocahontas County, Iowa, Defendants and Appellees.

Stipulation.

The parties to this cause, by their attorneys of record, agree that the following portions of the record shall constitute the transcript of the record on the pending Writ of Error to the Supreme Court of the United States, to-wit:

1. This Stipulation.
2. The appellants' abstract of the record.
3. Appellees' amendment to appellants' abstract of the record.
4. The opinion and judgment of the Supreme Court of Iowa.
5. Petition for writ of error, and allowance.

6. The assignment of errors, including the date of filing the same in the Supreme Court of Iowa.

188 7. Allowance of writ of error.

8. Bond, and approval thereof.

9. Writ of error.

10. Præcipe for record, and service thereof.

11. Citations in error, and service thereof.

12. Certificate of the Clerk of the Supreme Court of Iowa to the said transcript.

The Clerk of the Supreme Court of Iowa is accordingly requested to transmit only the papers designated in this Stipulation.

KELLEHER, HANSON & MITCHELL,
Attorneys and Counsellors of Record for the Plaintiffs and Appellants.

ROBERT HEALY,
Attorneys and Counselors of Record for S. F. Hiatt and Katz-Craig Contracting Company.

F. C. GILCHRIST,
Attorney and Counsel of Record for The Board of Supervisors of Pocahontas County, Iowa; W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klien, Members of the Board of Supervisors of Pocahontas County, Iowa; L. O'Donnell, as Auditor of Pocahontas County; John Forbes, County Treasurer of Pocahontas County, Iowa; Drainaga District Number Twenty-nine (29), *Pocahontas County, Iowa.*

189 [Endorsed:] Equity Numbers 4130 and 4152. William Breiholz et al., vs. Board of Supervisors et al. Stipulation.

190 Supreme Court of the State of Iowa.

Office of the Clerk.

STATE OF IOWA, *ss:*

I, B. W. Garrett, Clerk of the Supreme Court of Iowa, do hereby certify that the attached and foregoing is a true, correct and complete copy of the record in the case of William Breiholz, Edward Korf, Joseph Stuart, Mary Doyle, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitsman, J. M. De Vaul, Plaintiffs and Appellants, vs. The Board of Supervisors of Pocahontas County, Iowa; W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klien, Members of the Board of Supervisors of Pocahontas County,

Iowa; L. O'Donnell, as Auditor of Pocahontas County, Iowa; John Forbes, County Treasurer of Pocahontas County, Iowa; S. F. Hiatt, and the Katz-Craig Contracting Company, Drainage District Number Twenty-nine (29), Pocahontas County, Iowa, Defendants and Appellees, as true, correct and complete as the same now remains on file in my office and as provided by the stipulation inclosed.

Done at Des Moines, Iowa, this 7th day of October, 1919.

B. W. GARRETT,
Clerk of the Supreme Court.

Endorsed on cover: File No. 27,342. Iowa Supreme Court. Term No. 587. William Breiholz, Edward Korf, Joseph Stuart et al., plaintiffs in error, vs. The Board of Supervisors of Pocahontas County, Iowa, et al. Filed November 3d, 1919. File No. 27,342.

No. 23

FILED
MAR 17
JAMES D.

IN THE

Supreme Court of the United States

MARCH TERM, 1921.

WILLIAM BREIHOLZ, EDWARD KORF, JOSEPH STUART ET AL., PLAINTIFFS IN ERROR,

VS.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA, ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

(27,342)

DEFENDANTS IN ERROR'S MOTION TO DISMISS. & brief

ROBERT HEALY,
Fort Dodge, Iowa,
FREDERICK F. FAVILLE,
Fort Dodge, Iowa,
MAURICE J. BRESN,
Fort Dodge, Iowa,
F. C. GILCHRIST,
Laurens, Iowa,
Attorneys for Defendants in Error.

No. .....

IN THE

Supreme Court of the United States

MARCH TERM, 1921.

WILLIAM BREIHOLZ, EDWARD KORF, JOSEPH STUART ET AL., PLAINTIFFS IN ERROR,

VS.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA, ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.
(27,342)

DEFENDANTS IN ERROR'S MOTION TO DISMISS.

1.

The defendants in error respectfully move the court to dismiss the writ of error in this cause and to affirm the judgment heretofore rendered by the Supreme Court of the State of Iowa.

STATEMENT OF FACTS.

Object of Motion.

The plaintiffs in error brought this cause to this court on a writ of error to the Supreme Court of the State of Iowa, claiming that a Federal question was involved which was raised and decided adversely to plaintiffs in error by the Supreme Court of the State of Iowa.

A non-Federal question decisive of this cause was raised and decided by the Iowa Supreme Court adversely to the plaintiffs in error.

In the Iowa Court a fact question and a Federal law question were involved. The fact question was determinative of the contention of plaintiffs in error. The Board of Supervisors of Pocahontas County, Iowa, in strict accord with the Iowa statutes, established a drainage district. This drainage improvement, after the lapse of many years, became inefficient. When such fact was brought to the knowledge of the Board of Supervisors of Pocahontas County, that Board determined that it was expedient to take proper action, under the Iowa statute which vested the board with the power to repair the drainage improvement. This Iowa statute is known as Section 1989-A-21 of the Statutes of the State of Iowa. This statute provides:

> "After the district shall have been established and the improvement constructed * * * the improvement shall at all times be under the control

and supervision of the Board of Supervisors, and it shall be the duty of the Board to keep the same in repair * * * and they may cause the same to be enlarged, reopened, widened, straightened or lengthened for a better outlet."

It is the contention of the plaintiffs in error that the plaintiffs have been deprived of their property without due process of law, for the reason that they had no notice of the proceedings or hearing before the Board of Supervisors of Pocahontas County at any stage of the proceedings which culminated in the repair complained of, and in the action taken by the Board in reference thereto. The determinative fact question was whether the work done by the contractor was such as amounted to the construction of a new improvement or merely repair of the old drainage improvement. This determinative fact question was raised by the plaintiffs in error at every stage of this litigation and was decided by the Supreme Court of Iowa adversely to the contention of the plaintiffs in error. The Supreme Court of Iowa in deciding this case, said:

> "The charge in plaintiff's petition and repeated in argument, that the work contracted for and advertised included a lengthening or extension of the ditch or ditches beyond their original dimensions *is not justified by the record*, but, as we have said, it is to be conceded that the channels were not only reopened, cleaned and emptied of silt and obstructions, but were in part to some extent materially deepened" (R. second paragraph, page 89).

ARGUMENT.

Where a determinative non-Federal question and also a Federal question are involved, the decision of the State Supreme Court on the determinative non-Federal question is conclusive of the rights of the parties to this litigation, notwithstanding an adverse decision of the Supreme Court upon the Federal question raised and involved in this cause. This court has repeatedly held that even the decision by the State Court of a Federal question will not sustain the jurisdiction of the court if another question not Federal, was also raised and decided against the plaintiffs in error, or the decision thereof be sufficient notwithstanding the Federal question, to sustain the judgment.

In *Harrison* v. *Morton* (171 U. S. 38, 18 S. C. Rep. 742), the court said, on page 745:

> "It is settled law that to give this court jurisdiction of a writ of error to a State Court, it must appear affirmatively not only that a Federal question was presented for decision by the State Court, but that its decision was necessary to the determination of the cause and that it was actually decided adversely to the party claiming the right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it (*Murdock* v. *Memphis*, 20 Wall. 590; *Cook County* v. *Calumet, et al.*, 138 U. S. 635, 11 S. C. Rep. 435). It is likewise settled law that where the record discloses that *if a question has been raised and decided adversely to the party*

claiming the benefit of a provision of the Constitution or Laws of the United States, and another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment (*Wade* v. *Lawder*, 165 U. S. 624, 17 S. C. Rep. 425)."

Waters Pierce Oil Company v. *State of Texas*, 29 S. C. Rep. 227.

Mellon & Company v. *McCaffrey*, 239 U. S. 134, 36 S. C. Rep. 94.

Section 1989-A-3 of the Code of Iowa, is as follows:

"*Notice of Hearing—Approval of Plan.* Upon the filing of the return of the engineer, if the same recommends the establishment of a levee or drainage district, the Board of Supervisors shall then examine the return of the engineer, and if the plan seems to be expedient and meets with the approval of the Board of Supervisors, they shall direct the auditor to cause a notice to be given as hereinafter provided: * * * when the plan, if any, shall have been finally adopted by the Board of Supervisors, they shall order the auditor immediately thereafter, to cause notice to be given to the owners of each tract of land or lot within the proposed levee or drainage district, as shown by the transfer books of the auditor's office * * * of the pendency and prayer of said petition, favorable report thereon by the engineer, and that such report may be amended before final action, the day set for hearing of said petition and report before the Board of Supervisors, and that all claims for damages must be filed in the auditor's office not less than five days before the day set for hearing upon petition, which notice shall be served, except as otherwise

hereinafter provided, by publication thereof once each week for two consecutive weeks in some newspaper of general circulation published in the county." * * *

Section 1989-A-6 of the Code of Iowa, is as follows:

"*Assessment of Damages—Appeal.* The appraisers appointed to assess damages shall proceed to view the premises and determine and fix the amount of damages to which each claimant is entitled, and shall place a valuation upon all acreage taken for right of way as shown by plat of engineer, and shall, at least five days before the day fixed by the Board to hear and determine same, file with the county auditor reports in writing showing the amount of damages sustained by each claimant. * * * When the time for final action shall have arrived and after the filing of the report of appraisers, said board shall consider the amount of damages awarded in their final determination in regard to establishing such levee or drainage district, and if in their opinion the cost of construction and the amount of damages awarded is not excessive and a greater burden than should be properly borne by the land benefited by the improvement, they shall locate and establish same, and they shall thereupon appoint said engineer, as a commissioner, who shall make a permanent survey of said ditch as so located, showing the levels and elevations of each forty acre tract of land, and shall file a report of the same with the county auditor, together with a plat and profile thereof, and shall thereupon proceed to determine the amount of damage sustained by each claimant, and may hear evidence in respect thereto, and may increase or diminish the amount awarded in respect thereto and any party aggrieved may appeal from

the finding of the Board in establishing or refusing to establish the improvement district or from its finding in the allowance of damages to the district by filing notice with the county auditor at any time within twenty days after such finding and at the same time filing a bond with the county auditor, approved by him, and conditioned to pay all costs and expenses of the appeal, unless the finding of the District Court shall be more favorable to the appellant or appellants, than the finding of the Board. * * * If the appeal is from the amount of damages allowed, the amount ascertained in the District Court shall be rendered therefor. The amount thus ascertained shall be certified by the clerk of said court to the Board of Supervisors, who shall thereafter proceed as if such amount had been by it allowed the claimant as damages."

Code Section 1989-A-14, provides:

"*Appeal.* An appeal may be taken to the District Court from the order of the Board fixing the assessment of benefits upon the lands in the same manner and time as herein provided for appeals from the assessment of damages, and such appeal may be taken from the order of the Board of Supervisors increasing the apportionment within twenty days after the completed service of the notice of such increased apportionment in the same manner as herein provided for appeals in assessment for damages, whether objection was made to the report of the commissioners or not."

The decision of the Supreme Court of Iowa determines as a fact question that no new or additional right of way was taken in the work of cleaning, deepening and repairing the ditch; therefore, no real property of the plaintiffs in error was appropriated for public use for this purpose.

There are two theories to the plaintiffs' in error appeal, one being that the assessment levied for this repair constituted the taking of property without due process of law, and, secondly, that the deepening, widening, lengthening, etc., deprived the plaintiffs in error of their property without due process of law. Under our drainage statutes the plaintiffs in error had their day in court in so far as the assessment was made; that is, the assessment for the repair was simply a *pro rata* assessment made in proportion to the original assessment for the cost of construction of the ditch, said assessment for repair being merely a tax for upkeep, and said tax being established on the basis of the original assessment which was made with all the requirements of due process of law in relation to notice, day in court, right of appeal, etc., and surely, there can be no constitutional question as to the validity of the subsequent tax or assessment based on the proportion made at the time that the improvement was constructed, and at which time the plaintiffs in error had the right to object and had the right of appeal, both to the District Court and to the Supreme Court, and this assessment which the plaintiffs in error now complain of is merely and solely a tax for upkeep based on the figures which were found to be correct at the time the improvement was established.

Relative to the second proposition, in that the construction of this repair deprived the plaintiffs in error of their property without due process of law, it is our belief and our thought that this appeal should be dismissed

in that the fact question of whether or not there was a deepening, widening, and lengthening of this ditch was primarily controlling. That is, if there was a finding that there was no actual taking of the property, and the court so found, it would totally eliminate the constitutional question. That is, on the fact question, where our District Court and our Supreme Court found that none of the plaintiffs' in error property had been taken, that finally eliminated the question of whether or not it was taken without due process of law, because, from a logical and a legal standpoint, where both of our courts found that the property, as a fact question, was not taken, we fail to see where the constitutional question is involved; and we do not believe that the Supreme Court of the United States will pass on the moot question of whether or not this property was taken without due process of law, when our own state courts affirmatively held that the property was not taken.

Defendants in error respectfully ask that this writ of error be dismissed and that the judgment of the Iowa Supreme Court be affirmed.

Robert Healy

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HEALY & BREEN,
Fort Dodge, Iowa,
F. C. GILCHRIST,
Laurens, Iowa,
Of Counsel.

BRIEF FOR THE PLAINTIFF IN ERROR

JAMES D. MAHER, CLERK

IN THE

Supreme Court of the United States

NUMBER 423, 23

OCTOBER TERM, 1920.

WILLIAM BREIHOLZ, EDWARD KORF, JOSEPH STUART, ET AL., *Plaintiffs in Error,*

vs.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

(27,342)

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TABLE OF CASES.

IN THE

Supreme Court of the United States

NUMBER 196.

OCTOBER TERM, 1920.

WILLIAM BREIHOLZ, EDWARD KORF, JOSEPH STUART, ET AL., *Plaintiffs in Error,*

vs.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF FOR THE PLAINTIFFS IN ERROR

PRELIMINARY STATEMENT.

This is a Writ of Error to the Supreme Court of Iowa to review a judgment which affirmed a judgment of the District Court of Pocahontas County, Iowa, rendered against the Plaintiffs in Error, dismissing their claim for the cancellation of certain drainage assessments, and denying injunctive relief against their collection.

The case involves the constitutional validity under the due process clause of the Fourteenth Amendment of certain provisions of the statutes of the State of Iowa, which, as construed by the Supreme Court of this State, do not require notice to the taxpayer or fix a time or place of hearing, and, as construed by the Court, grant to the taxing power the authority to enlarge a previously constructed drainage district and to assess the costs thereof and fix the same irrevocably on a basis of the original levy, without notice to the

taxpayer, and without giving him an opportunity to contest the validity or amount.

The Plaintiffs in Error, owners of various parcels of land, embraced within Drainage District Number 29 of Pocahontas County, Iowa, brought this proceeding in equity to enjoin the collection, and for the cancellation of assessments levied upon their lands for the alleged expense, or cost of cleaning, repairing and enlarging certain existing and established open drainage ditches within the District, of which assessments, it was undisputed or was admitted by the Defendants in Error, that the Plaintiffs in Error had no notice nor any opportunity to contest its validity or amount.

STATEMENT OF THE CASE.

The Issues.

It will be conducive to a better understanding of the facts that the issues be now referred to. Briefly stated, and omitting all averments which are not germane to the Federal questions here involved, the Bill of the Plaintiffs in Error (Plaintiffs below) alleged:

That, acting for and in behalf of the Drainage District, the Board of Supervisors, Defendant in Error, entered into a contract with the Defendant in Error, Hiatt, for the deepening, cleaning, reopening and repair of certain ditches within Drainage District Number 29. That Hiatt entered upon the work provided for in said contract and completed it, but not only deepened, cleaned, reopened and repaired the ditches, but in addition thereto, lengthened, enlarged, extended and widened the ditches. That, upon completion of the work done by Hiatt, the Board directed the County Auditor to assess the cost of the work done upon all the lands within the District in proportion to their assessment for the original construction of the ditches within the District. That no notice of any kind or character was ever given to the land owners within the District of any proposed action of the Board affecting their lands within the District, or of the fact that a contract was to be let for work to be done within the District, nor was any notice ever given to them that any assessment was to be made or had been made to pay the cost of the work done, nor were they ever given, at any stage of the proceeding, any opportunity to contest:

(1). The necessity or advisability of the work or any changes to be made in the existing ditches.

(2) To show what, if any, benefits, the Plaintiffs (Plaintiffs in Error) would derive from the changing, reopening, repairing and deepening of the existing ditches.

(3). To show that the original classification of the lands was an improper classification for the purposes of assessment, in that, it did not take into account what benefits, if any, would be derived by the new work, and that the original classification was an improper classification to be used as the basis of the new assessment in view of the changes to be made in the existing ditches within the District.

(4). To show that the work contemplated was of benefit to other taxpayers in the District, and was of no benefit to the Plaintiffs (Plaintiffs in Error).

That the Plaintiffs (Plaintiffs in Error) were never given an opportunity to be heard as to the validity of the assessment or the amount thereof, and that no notice of any kind or character was given the Plaintiffs (Plaintiffs in error) thereof, and that they had no knowledge of the assessment until it appeared on the assessment roll, and thereupon, was a lien, under the statutes, on their lands, and having passed to the roll was irrevocably fixed.

That by reason of the facts thus plead, the assessments were void because:

(1). The said levy, or attempted levy, was made without any notice, hearing, or opportunity for hearing, or any opportunity for the Plaintiffs (Plaintiffs in Error) to object to the same, or to the apportionment thereof, or to the classification of their lands, and the same constituted the taking of lands of the Plaintiffs (Plaintiffs in Error) and depriving the Plaintiffs of their property without due process of law, contrary to Article XIV, being the Fourteenth Amendment to the Constitution of the United States. (R. p. 15.)

(2). That the section of the Iowa statute, to wit Supplement, Section 1918a-21, in providing for or authorizing the assessment or levy of such taxes without notice, hearing or opportunity therefor to the land owners whose property is sought to be burdened with such assessment and levy, is in contravention of and in violation of the said Fourteenth Amendment to the Constitution of the United States, in that it deprives these Plaintiffs of their property without due process of law, and such statute, and the assessment or levy made thereunder, is therefore void and of no effect. (R. p. 15.)

(3). That said statute is void and in contravention of said constitutional provisions of the Constitution of the United States because it makes no provision for a hearing or opportunity to be heard by the interested parties, and those against whom and whose property, assessments and taxes are thereby authorized to be levied, upon the question of the propriety or necessity of the improvement, enlargement or repair, or upon the question of whether the benefits which will result therefrom will accrue to the property owners in

the same proportion as the original apportionment and assessment, or upon the question of whether any benefits will accrue to all of the property assessed for the original improvement. (R. p. 15.)

(4). That said pretended levy and assessment, being made without notice or information to the Plaintiffs, or property owners, and without any hearing or opportunity therefor, either in respect of the propriety or necessity of the improvement, or the apportionment of the tax, or the distribution of the burden thereof is void, because the Plaintiffs are sought to be deprived of property without due process of law, and the same violates the Fourteenth Amendment to the Constitution of the United States, and the Plaintiffs expressly claim the benefit and protection of said constitutional provision. (R. p. 16.)

(5). That said assessment and levy and the ordering of the enlargement, changes and additions to said improvement were made without any hearing or notice, or any opportunity for hearing, and the said assessment and levy are in contravention of the provisions of the Constitution of the United States forbidding the taking of private property without due process of law, and is in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States, and the provisions of Section 1989a-21 of the Supplement of the Code of Iowa, and other provisions of the statute in reference to the levy of assessments and taxes for the payment of drainage improvements, in so far as they authorize the establishment or ordering of the improvement, and the making of such levy or assessment without any hearing or opportunity for hearing are void because in contravention of the said provisions of the United States. (R. p. 16.)

(6). That the said levy and assessment were not, and are not required for the payment of the original improvement in accordance with the classification and apportionment in the construction of said improvement as originally constructed. That the said moneys are sought to be raised by said levy and assessment, in large part, for new and enlarged ditches and improvements, for the purpose of benefiting, and the same will benefit only a portion of the property and property owners whose property was assessed for said original improvement, the said property and persons being other than the property of and the Plaintiffs. That the Plaintiffs were, because thereof, entitled to be heard in reference to the establishment and ordering of the improvement and the classification of their lands in ratio to the benefits and apportionment of said tax and before the same was spread, levied or assessed. That no notice of any hearing, or intention to make said levy or assessment or to spread said taxes, was ever given to the Plaintiffs and no opportunity to present to the said Board of Supervisors the claim of the Plaintiffs in

reference to a just and equitable apportionment of said levy and assessment. That the amount of the tax to be exacted against the Plaintiffs depended upon and should be proportioned in equitable ratio in reference to the benefits derived from the improvement for which said expenditures were made, or sought to be made.

And the Plaintiffs aver and state that upon any notice or hearing, they would be entitled to show and show that all benefits to be derived therefrom would accrue to the property and persons other than the Plaintiffs or their property. That the said pretended levy and assessment constitute the actual taking of the private property of the Plaintiffs, without notice and without any opportunity for hearing, and without any opportunity to show that the original classification and apportionment, though just and equitable as to the cost of the original cost of the improvement, is wholly unjust and inequitable to the Plaintiffs in so far as it involves the expenditures for which said levy and assessments were made and are now sought to be enforced. (R. pp. 16-17.)

The ultimate facts, as thus set forth and alleged, in the Bill of the Plaintiffs (Plaintiffs in Error), were undisputed in that the allegations of the ultimate facts were either admitted or not denied in the pleadings of the Defendants, or were undisputed in the evidence adduced upon the trial. The Defendants in Error, other than the Defendant in Error, Hiatt, admitted in their pleadings that the contract made with Hiatt was made so that the improvement could be enlarged, reopened, deepened, widened and repaired, in order to effect, as it is claimed, the best interest of the public, and that it was the duty of the Board of Supervisors to keep the improvement in repair, and for that purpose, it entered into said contract. That, if the Plaintiffs (Plaintiffs in Error) were to be given the relief prayed for by them that the cost of the work would, thereupon be thrust upon the owners of other lands in the District, and thereby, the Plaintiffs would receive a wicked, illegal and unconscionable advantage, and the Plaintiffs would, thereby, escape the burden of paying any part of said work. That the order and resolution for the fixing of the assessments and the apportionment thereof for the construction of the original improvement was made upon full notice to the Plaintiffs and upon full opportunity to be heard.

The Defendant, Hiatt, averred that he had not sufficient knowledge or information as to the allegations of the Plaintiff, and therefore, demanded strict proof thereof, and offered "to do equity."

STATUTE INVOLVED.

The statute in issue in this case is Section 1989-a21 of the Code of Iowa, and reads as follows, (omitting inapplicable portions):

> Control—repairs—cost.
> "Whenever any levee or drainage district shall have been established and the improvement constructed as in this chapter provided, the same shall at all times be under the control and supervision of the board of supervisors, and it shall be the duty of the board to keep the same in repair, and for that purpose they may cause the same to be enlarged, reopened, deepened, widened, straightened or lengthened for a better outlet, and they may change or enlarge the same or cause all or any part thereof to be converted into a closed drain when considered for the best interests of the public rights affected thereby. The cost of such repairs or change shall be paid by the board from the drainage fund of said levee or drainage district, or by assessing and levying the cost of such change or repair upon the lands in the same proportion that the original expenses and cost of construction were levied and assessed, except where additional right of way is required or additional lands affected thereby in either of which cases the board shall proceed as hereinbefore provided."

THE IOWA DRAINAGE STATUTE.

In order that this Court may have before it the material provisions of the Iowa Drainage statute as the same is referred to in the opinion of the Supreme Court of Iowa, and in this argument, we set it out below:

> "Section 1989-a1. BOARD OF SUPERVISORS TO ESTABLISH DRAINAGE DISTRICT. The Board of Supervisors of any county shall have jurisdiction, power and authority * * * to establish a drainage district or districts * * * and cause to be constructed as hereinafter provided, any levee, ditch, drain * * * in such County. * * *"
>
> "Section 1989-a2. PROCEEDINGS—Bond—SURVEY. Whenever a petition signed by one or more of the landowners whose lands will be affected by, or assessed for the expenses of, the proposed improvement, shall be filed in the office of the County Auditor setting forth that * * * such lands, subject to overflow or too wet for cultivation * * * the Board shall at its first session thereafter

* * appoint a disinterested and competent engineer, * * and place a copy of the petition in his hands, and shall proceed to examine the lands described in said tition, and any other land which would be benefited said improvement or necessary in the carrying out of id improvement, and survey, and locate such drain or ains, ditch or ditches, improvement or improvements may be practicable and feasible to carry out the purse of the petition. * * * He shall make return of his oceedings to the County Auditor which return shall t forth the starting point, the route, the terminus or rmini of said ditch or ditches, drain or drains, or other provements, together with plat and profile showing tches, drains or other improvements and course and ngth of the drain or drains through each tract of land, gether with the number of acres appropriated from id tract for the construction of said improvement and evation of all lakes, ponds and deep depressions in id district and boundary of the proposed district, so to include therein all lands that will be benefited by e proposed improvement and description of each tract land therein, names of owners thereof as shown by e transfer books in the Auditor's office, together with e probable cost, and such other facts and recomendations as he may deem material. * * *"

"Section 1989-a3. NOTICE OF HEARING—APROVAL OF PLAN. Upon the filing of the return of the gineer, if the same recommends the establishment of levee or drainage district, the Board of Supervisors all then examine the return of the Engineer, and if the an seems to be expedient and meets with the approval the Board of Supervisors, they shall direct the Auditor cause a notice to be given as hereinafter provided; * * * nen the plan, if any, shall have been finally adopted the Board of Supervisors, they shall order the Auditor mediately thereafter, to cause notice to be given to the wners of each tract of land or lot within the proposed vee or drainage district, as shown by the transfer books the Auditor's office * * * of the pendency and prayer said petition, favorable report thereon by the engineer, d that such report may be amended before final acn, the day set for hearing of said petition and report fore the Board of Supervisors, and that all claims for mages must be filed in the Auditor's office not less than e days before the day set for hearing upon petition, nich notice shall be served, except as otherwise hereafter provided, by publication thereof once each week r two consecutive weeks in some newspaper of general rculation published in the county." * * *

"Section 1989-a5. LOCATION—APPRAISERS. The Board of Supervisors at the session set for hearing on said petition, * * * shall thereupon proceed to hear and determine the sufficiency of the petition in form and substance; * * * if they shall find such improvement conducive to the public health, convenience or welfare or to the public benefit or utility * * * they may, if deemed advisable, locate and establish same in accordance with the recommendations of the engineer, or they may refuse to establish the same as they may deem best." * * *

"Section 1989-a6. ASSESSMENT OF DAMAGES—APPEAL. The appraisers appointed to assess damages shall proceed to view the premises and determine and fix the amount of damages to which each claimant is entitled, and shall place a valuation upon all acreage taken for right of way as shown by plat of engineer, and shall, at least five days before the day fixed by the Board to hear and determine same, file with the County Auditor reports in writing showing the amount of damages sustained by each claimant. * * * When the time for final action shall have arrived and after the filing of the report of appraisers, said board shall consider the amount of damages awarded in their final determination in regard to establishing such levee or drainage district, and if in their opinion the cost of construction and the amount of damages awarded is not excessive and a greater burden than should be properly borne by the land benefited by the improvement, they shall locate and establish same, and they shall thereupon appoint said engineer, as a commissioner, who shall make a permanent survey of said ditch as so located, showing the levels and elevations of each forty acre tract of land, and shall file a report of the same with the County Auditor, together with a plat and profile thereof, and shall thereupon proceed to determine the amount of damage sustained by each claimant, and may hear evidence in respect thereto, and may increase or diminish the amount awarded in respect thereto and any party aggrieved may appeal from the finding of the Board in establishing or refusing to establish the improvement district or from its finding in the allowance of damages to the district by filing notice with the County Auditor at any time within twenty days after such finding and at the same time filing a bond with the County Auditor approved by him, and conditioned to pay all costs and expenses of the appeal, unless the finding of the District Court shall be more favorable to the appellant or appellants, than the finding of the Board. * * * If the appeal is from the amount of damages allowed, the amount ascertained in the District Court shall be entered of record but no judgment shall be rendered there-

for. The amount thus ascertained shall be certified by the Clerk of said Court to the Board of Supervisors, who shall thereafter proceed as if such amount had been by it allowed the claimant as damages. * * *

"Section 1989-a7. DAMAGES—BY WHOM PAID—DIVISION INTO DISTRICTS—ENGINEER. * * * The Board shall divide said improvement into suitable sections, numbering same consecutively from the source or beginning of the improvement downwards towards its outlet, and prescribe the time within which the improvement shall be completed, and appoint a competent engineer to have charge of the work and construction thereof." * * *

"Section 1989-a8. LETTING OF WORK—NOTICE—BIDS. The board shall cause notice to be given by publication, once each week, for two consecutive weeks in some newspaper published in the County wherein such improvement is located * * * of the time and place of letting the work of construction of said improvement, and in such notice they shall specify the approximate amount of work to be done in each section; * * * and when the estimated cost of said improvement exceeds fifteen thousand dollars the Board shall make additional publication for two consecutive weeks in some contracting journal of general circulation, of such notice as they may prescribe, and they shall award contract or contracts for each section of work to the lowest responsible bidder or bidders therefor, bids to be submitted, received and acted upon separately as to the main drain and each of the laterals, exercising their own discretion as to letting such work as to the main drain as a whole, or as to each lateral as a whole, or by sections as to both main drain and laterals, and reserving the right to reject any and all bids and readvertise the letting of the work." * * *

"Section 1989-a 9. MONTHLY ESTIMATES—PAYMENT. The engineer in charge of the construction shall furnish the contractor monthly estimates of the amount of work done on each section, and upon filing the same with the Auditor, he shall draw a warrant in favor of such contractor, or deliver to him improvement certificates, as the case may be, for eighty per centum of the value of the work done according to the estimate, and when said improvement is completed * * * the Auditor shall draw a warrant in favor of said contractor upon the levee or drainage fund, * * * for the balance due."

"Section 1989-a 12. ASSESSMENT OF COST AND DAMAGES—APPORTIONMENT. When the levee or drainage district or other improvement herein provided for shall have been located and established as provided for in this Act, or when it shall be necessary to cause

the same to be repaired, enlarged, reopened or cleared from any obstructions therein, unless such repairs, reopening or clearing of obstructions can be paid for as hereinafter provided, the Board shall appoint three commissioners, one of whom shall be a competent civil engineer and two of whom shall be resident freeholders of the State, not living within the levee or drainage district and not interested therein or in a like question, nor related to any party whose land is affected thereby; and they shall within twenty days after such appointment, begin to personally inspect and classify all lands benefited by the location and construction of such levee or drainage district or the repairing or reopening of same, in tracts of forty acres or less according to the legal or recognized subdivisions in a gradual scale of benefits to be numbered according to the benefit to be received by the proposed improvement; and they shall make an equitable apportionment of the cost, expenses, costs of construction, fees and damages asessed for the construction of any such improvement, or the repairing or reopening of same, and make report thereof in writing to the Board of Supervisors. In making the said estimate the lands receiving the greatest benefit shall be marked on a scale of one hundred and those benefited in a less degree shall be marked with such percentage of one hundred as the benefit received bears in proportion thereto. This classification when finally established shall remain as a basis for all future assessments connected with the object of said levee or drainage district, unless the Board, for good cause, shall authorize a revision thereof. In the report of the appraisers so appointed they shall specify each tract of land by proper description and the ownership thereof as same appears on the transfer books in the Auditor's office, and the Auditor shall cause notice to be served upon each person whose name appears as owner * * * in the time and manner provided for the establishment of a levee or drainage district, which notice shall state the amount of special assessments apportioned to such owner upon each tract or lot, the day set for hearing the same before the Board of Supervisors and that all objections thereto must be made in writing and filed with the County Auditor on or before noon of the day set for such hearing. When the day set for hearing shall have arrived, the Board of Supervisors shall proceed to hear and determine all objections made and filed to said report, and may increase, diminish or annul or affirm the apportionment made in said report or in any part thereof as may appear to the Board to be just and equitable; but in no case shall it be competent to show that the lands

assessed would not be benefited by the improvement, and when such hearing shall have been had, the Board shall levy such apportionment so fixed by it, upon the lands within such levee or drainage district; * * * and in case the Board of Supervisors shall increase said apportionment, service of notice thereof shall be made upon the owner of such tract or lot of land as shown by the transfer books in the Auditor's office in the same manner in which original notices are required to be served. * * *"

"Section 1989-a 13. LEVY AND COLLECTION OF TAX-WARRANTS. In estimating the benefits as to the lands not traversed by said improvement, they shall not consider what benefits such lands will receive after some other improvements shall have been constructed, but only the benefits which will be received by reason of the construction of the improvement in question as it affords an outlet for the drainage of such lands, or brings an outlet nearer to said lands or relieves same from overflow. Said tax shall be levied upon the lands of the owner so benefited in the ratio aforesaid." * * *

"Section 1989-a 14. APPEAL. An appeal may be taken to the District Court from the order of the Board fixing the assessment of benefits upon the lands in the same manner and time as herein provided for appeals from the assessment of damages, and such appeal may be taken from the order of the Board of Supervisors increasing the apportionment within twenty days after the completed service of the notice of such increased apportionment in the same manner as herein provided for appeals in assessment for damages, whether objection was made to the report of the commissioners or not." * * *

"Section 1989-a 26. SPECIAL ASSESSMENT—HOW PAID. Special assessment for benefits made by the Commissioners appointed for that purpose, as corrected and approved by the Board of Supervisors shall be levied at one time by the Board against the property so benefited, and when levied and certified shall be payable at the office of the County Treasurer," * * * shall mature at one time and be due and payable with interest from the date of such assessment, and shall be collected at the next succeeding March semi-annual payment of ordinary taxes."

STATEMENT OF FACTS.

In the year, 1907, pursuant to the statutes of the State of Iowa, a drainage district, being the 29th, organized within Pocahontas County, Iowa, was duly established and designated as Drainage District Number 29 by the Board of Super-

visors of that County. (R. p. 2.) The district was thereupon improved by the construction of a drainage system composed of a certain main open ditch and laterals or branches, leading thereto, known as Branch "A" and Branch "B". (R. pp. 2-29-31-61.) The system of drains was completed in 1909. In the year 1910, the engineer in charge of the district reported to the Board of Supervisors who, under the statutes, is the governing body of all drainage districts within the county that the open ditches within the district had become filled with silt or sediment to an extent, and recommending that the channels be cleaned of that obstruction. (R. p. 40.) He estimated the silt and sediment so deposited in the channel at 5,500 cubic yards. (R. p. 40.) No action was taken by the Board of Supervisors on this report of the engineer, Warrington. (R. p....) In March, 1911, a further report was filed by the engineer, again recommending that the channels be cleaned of the sediment which had been deposited therein. (R. p. 68.) Acting upon this report and approving it, the Board entered into a contract with the Defendant in Error, Hiatt. (R. p. 47.) This contract had, among other provisions, the following:

> "Party of the second part hereby agrees to *deepen, clean, reopen and repair* said drainage district number 29 from Station Zero to Station 27 in the manner and to the proportionate depth and width as specified in the report of W. B. Warrington, filed March 6, 1911, and from Station 37 to Station 87, from Station 87 to Station 170, and from Station 170 to Station 250, the above approximating about 35,186 cubic yards herein called the lower end of said drainage district; also in addition to the above mentioned work in the lower end of said district, second party agrees to clean, reopen and repair Branch "A" of said district from Station Zero to Station 23 as specified in the engineer's report, approximating about 936 cubic yards in said Branch "A", the same to be done as part of the lower end of said district, and to clean, reopen, deepen and repair said drainage improvement from Station 402 to Station 500 as specified in said engineer's report and approximating about 7317 cubic yards, and herein called the upper end of said district, agreeing to clean, reopen and deepen said improvement according as the same is specified by said engineer's report * * * and agreeing to be governed in the performance of his part of said contract by the provisions of the Acts of the 30th General Assembly, Chapter 68, and all acts amendatory thereto relative to the construction of drainage improvement. * * * Party of the second part agrees to reopen, repair and clean said improvement under the supervision of the engineer in charge."

The letting of the contract was not advertised and was not offered for bids. (R. pp. 40 and 73-74.) The Defendant in Error, Hiatt, proceeded under the contract to perform the work, and upon its completion, the Board ordered the costs thereof to be assessed by the County Auditor and spread upon the lands within said district in proportion to their assessment for the original construction of the ditches within the District. (R. p. 40.)

No notice of any kind or character was ever given to any of the land owners within the District of any proposed action, affecting their lands, or of the fact that a contract was to be let for work to be done in the District, nor was any notice given to them that any assessment was to be made or had been made to pay the costs of the work done, nor were they given an opportunity to contest its validity or amount. The first knowledge that the Plaintiffs in Error, land owners, had as to any liability which was to be imposed upon them or upon their lands within the District, was gained when they went to pay their ordinary land taxes and found on the assessment rolls the special assessment against their lands. (R. p. 40.) The statutes of the State of Iowa make no provisions for an appeal or hearing as to special assessments after they have been entered on the assessment roll.

The contract called for a *deepening, cleaning, reopening* and *repairing* of the ditches existing in the drainage district. (R. p. 69.) The Bill of the Plaintiffs in Error likewise averred this fact, and further charged that the work actually done was not only the *deepening, cleaning, reopening* and *repairing*, but in addition thereto, the lengthening, enlarging, widening and extension of the ditches. (R. pp. 5 and 10.) These allegations were admitted by the Defendants in Error other than Hiatt, who alleged that he had not sufficient knowledge to determine the correctness of the allegations as charged by the Plaintiffs in Error, and demanded strict proof thereof, and "offered to do equity." (R. pp. 19 and 21.) The undisputed evidence is that the ditches were deepened, widened, lengthened, repaired and extended. The Defendant in Error, Hiatt, who had the contract for the work, admits in his testimony that he changed the slope of the ditches and deepened, widened and extended them and does not challenge, in his testimony, the other facts set out above. As illustrative of the amount and character of the work done, Hiatt admitted in his testimony that he was seeking compensation and had received drainage warrants, payable out of funds to be raised out of the assessment, for excavating 3,399 cubic yards on Branch "A", (R. pp. 64-65), while the contract called for an excavation of 936 cubic yards therein, which was almost equivalent to about four times the amount stated in the contract and five times the cubic yardage which would

necessarily have been excavated to have brought the ditch to the same dimensions as it was originally constructed. (R. p. 68.)

SPECIFICATIONS OF ERROR.

1. Section 1989-a-21, of the Code of Iowa in so far as it attempts to clothe the Board of Supervisors with ex parte power and authority to enlarge, by widening, deepening and lengthening a ditch theretofore constructed, is unconstitutional and void by reason of its failure to provide some kind of notice to those who are required, by statute, to defray the expense of the improvement, or afford an opportunity, at some state of the proceedings, to be heard upon all questions necessary to be determined in order to justify the proposed work, and the Supreme Court of Iowa, in failing to so hold and adjudge, committed manifest error.

2. The Supreme Court of Iowa, in holding and adjudging that no notice was requisite in proceedings had under section 1989-a-21 of the Code of Iowa, erred in holding and adjudging that said section was not unconstitutional and void as depriving those against whom assessments are made of their property without due process of law.

3. The statute, Section 1989-a-21 of the Code of Iowa, is not limited to mere ordinary repairs of an existing ditch. It not only authorizes repairs, but grants to a Board of Supervisors the further power to enlarge the ditch by widening its bank or deepening its channel, and, respecting this additional power, it contains no limitation respecting the extent to which the board may go. The Supreme Court of Iowa, therefore, in holding that section 1989-a-11 of the Code was not to be read in connection with section 1989-a-21, so as to require notice under section 1989-a-21, erred in holding and adjudging that said section 1989-a-21 was not unconstitutional and void.

4. In as much as section 1989-a-21 of the Code as construed by the Supreme Court of Iowa, does not require notice, and authorizes and empowers a Board of Supervisors to enlarge a previously constructed ditch by widening its banks and deepening its channel and even extending the ditch beyond its original construction, it is unconstitutional and void, for the reason that it contains no provision for notice to interested parties or otherwise affords them an opportunity to be heard, and the Supreme Court of Iowa, in not so holding, committed manifest error.

5. Code Section 1989-a-21, as administered and construed by the Supreme Court of Iowa, directly violates

and infringes the provisions of the Constitution of the United States in that the Supreme Court of Iowa holds and adjudges that no notice need be given to interested landowners of a deepening, widening and lengthening of an existing drainage ditch, and that an assessment may be levied to defray the costs thereof without notice or an opportunity to be heard, and by reason thereof the Supreme Court of Iowa committed manifest error, in so adjudicating the claims of the plaintiffs.

6. The Board of Supervisors were without power to make a contract for the purpose of deepening, widening, lengthening, enlarging and repairing of a ditch which had already been constructed, and to assess the cost thereof against the land owners within the district, without giving notice, and the Supreme Court of Iowa, in holding and adjudging to the contrary, committed manifest error for the reason that the land owners were deprived of their property without due process of law, contrary to Articles 5 and 14 of the Constitution of the United States.

7. The work done under the contract in this case was not a mere cleaning and repairing, but was widening of the banks and a deepening of the channel of the existing drainage ditch and therefore of a character requiring notice to be given to the land owners affected, and no notice having been given, the land owners were deprived of their property without due process of law. And the Supreme Court of Iowa committed manifest error in holding that the land owners were not entitled to a hearing or *notice of the letting of the contract* and of the assessment made thereunder.

8. The levy of the assessment against the lands of the plaintiffs, to pay for the construction of the work provided for in the contract, was void, and the county treasurer, in attempting to sell the lands of the plaintiffs for delinquent taxes, was without authority so to do, and the Supreme Court of the State of Iowa, in adjudging to the contrary, committed manifest error to the prejudice and rights of the plaintiffs, under and by virtue of the Constitution of the United States.

9. The tax and asessment, as levied by the Board of Supervisors of Pocahontas County, Iowa, and spread upon the tax records, is void and should have been ordered cancelled, and the collection thereof enjoined for want of any notice, and for failure to afford the tax payer an opportunity for hearing upon the question of subjecting his property to such tax and assessment, the same being levied and asesssed for a substantially and materially altered, widened, deepened and enlarged drainage improvement, without due process of law, and

contrary to Articles Five and Fourteen of the Constitution of the United States. And the Supreme Court of Iowa, in so failing to hold and to reverse the action of the trial court, committed manifest error.

10. Section 1989-a-21, as administered and justified by the Supreme Court of the State of Iowa, is unconstitutional and void for the reason it affords to interested land owners no opportunity whatsoever to file claims for damages. And the Supreme Court of the State of Iowa, in not so holding, committed manifest error.

11. Section 1989-a-21, as construed, administered and applied by the Supreme Court of Iowa, does not provide an opportunity to land owners affected, to file objections to assessments levied against their lands, and, by reason thereof contravenes the provisions of Articles Five and Fourteen of the Constitution of the United States. And the Supreme Court of the State of Iowa, in not so holding, committed manifest error.

12. Section 1989-a-21, as construed, administered and applied by the Supreme Court of the State of Iowa, fails to provide for any right of appeal to the interested land owners, and, by reason thereof, violates Articles Five and Fourteen of the Constitution of the United States. And the Supreme Court of Iowa, in not so holding, committed manifest error.

13. The assessment for the original construction of Drainage District Number Twenty-nine (29) having been levied as a unit and spread over the district without reference to the benefit received, contrary to the Statutes of Iowa, and the same method and classification having been used in spreading the assessment for the work done under the contract complained of, there was, by reason thereof, a taking of property without reference to the benefits received and without due process of law, and contrary to the Constitution of the United States. And the Supreme Court of the State of Iowa, in not so holding, committed manifest error.

14. The Board of Supervisors of Pocahontas County, Iowa, having levied an assessment to cover the cost of Construction under the Hiatt contract, and which assessment was for work of construction done outside of Pocahontas County, as well as within Pocahontas County, Iowa, the assessment was void for want of jurisdiction, and the Board of Supervisors, in levying the assessment to pay for work, some of which was work done outside of the territorial limits of the county, therefore violated the Constitution of the United States. And the Supreme Court of the State of Iowa, in not so holding, committed manifest error.

FINAL ISSUES.

The foregoing specifications of error may be grouped for the purpose of simplifying the argument into five fundamental questions which therefore may be classed as main issues in the case. Accordingly, errors one, two, four, five, six, eight, eleven and twelve may be stated as follows:

Issue One.

The Supreme Court of Iowa erred in adjudging that Code Section 1989-a 21 was constitutional inasmuch as the statute as construed, and justified by that Court, grants to the Board of Supervisors of the county power and authority to enlarge by widening, deepening and lengthening a ditch already constructed, and to assess the costs thereof upon the lands of the landowners in the district, in the same proportion as the lands were assessed for the improvement when originally constructed, is without reference to the benefits or lack of benefits which may accrue by reason of the altered ditch and without notice to, or opportunity for hearing being given the landowners, nor providing for any appeal from their action in the premises.

Issue Two.

Error three may be stated as follows: Section 1989-a21 of the Code of Iowa is not limited to mere ordinary repairs of an existing ditch, but grants to a Board of Supervisors further power to enlarge the ditch by widening its bank or deepening its channel and respecting this additional power, it contains no limitations respecting the extent to which the Board may go, and, accordingly, the Supreme Court of Iowa in holding that this section was not to be read in connection with Section 1989-a11 so as to require notice erred in holding and judgment that Section 1989-a21 was not unconstitutional and void.

Issue Three.

Errors seven and nine may be stated as follows:

The work done under the contract was not a mere cleaning and repairing, but was the widening of the banks and deepening of the channel of the existing drainage ditch, and therefore of a character requiring notice to be given the landowner affected, and to afford them an opportunity for hearing upon the question of subjecting their property to the tax and assessment for a substantial and materially altered, widened, deepened and enlarged drainage improvement; and the Supreme Court of Iowa in adjudging and holding that

the landowners were not entitled to notice or an opportunity for hearing, committed error in that the landowners were denied due process of law, contrary to Article Fourteen of the Constitution of the United States.

Issue Four.

Error Thirteen may be stated as Issue Four.

The assessment in the instant case having been levied against the land in the district in the same ratio as the lands were assessed for the expense of the original construction, without reference to benefits received there was a taking of property without due process of law, contrary to the constitution of the United States.

Issue Five.

Error Fourteen may be stated as Issue Five.

The assessment in the case having been levied to cover the costs of construction of work done outside of the county as well as within the county, the assessment was void for the reason that the Board was without jurisdiction to assess for work done outside of the territory of limits of the county, and the assessment therefore was without due process of law.

Error Number Ten is not maintainable and is therefore waived.

QUESTION INVOLVED.

The principal question in the case, as set forth in the assignments of error, arises upon the contention of the plaintiffs in error that the method of assessment provided for the taxation of property in such cases as the present as laid down in the statutes of the State of Iowa, as construed by the Supreme Court of the State, does not afford the tax payer due process of law.

I.

BRIEF OF POINTS AND AUTHORITIES.

This Court has jurisdiction of the case. The validity of the Iowa Statute Sec. 1989-a-21, and of the authority exercised thereunder, was drawn in question on the ground of its being repugnant to the Constitution of the United States, and the decision of the state court was in favor of its validity.

Sec. 237 Judicial Code;

Philadelphia etc. Co. v. Gilbert, 245 U. S. 162, 62 L. Ed. 221, 38 Sup. Ct. Rep. 58;

Northern Pac. R. Co. v. Solum, 247 U. S. 477, 62 L. ed. 1221;
Ireland v. Woods, 246 U. S. 323, 62 L. ed. 745, 38 Sup. Ct. Rep. 319;
Stadelman v. Miner, 246 U. S. 544, 62 L. ed. 875, 38 Sup. Ct. Rep. 359;
Coon v. Kennedy, 248 U. S. 457, 63 L. ed. 358;
New Orleans and Northeastern Railroad Co. v. Scarlet, 249 U. S. 528, 63 L. ed. 752;
Dana vs. Dana, 250 U. S. 220, 63 L. ed. 947;
Kenney Administrator, etc. v. Supreme Lodge of the World, 64 L. ed. U. S. Advance Opinions 459.

II.

The essentials of due process are notice and hearing.
Londoner v. Denver, 210 U. S. 373, 52 L. ed. 1103, 28 Sup. Ct. Rep. 708;
Central of Georgia R. Co. v. Wright, 207 U. S. 127, 52 L. ed. 134, 28 Sup. Ct. Rep. 47;
Turner v. Wade, decided Nov. 8, 1920, reported at page 23 L. ed. U. S. Adv. Op.

III.

If the legislature of a state, instead of fixing the tax or assessment itself, commits to a subordinate body the duty of determining whether, and in what amount, and upon whom the tax or assessment shall be levied, due process of law requires that at some stage of the proceedings, before the tax or assessment becomes irrevocably fixed, the tax payer must have the opportunity to be heard, of which he must have notice whether personal, by publication, or by some statute, fixing the time and place of the hearing.
Turner v. Wade, 65 L. ed. Advance Opinions 1920 23, 24;
Londoner v. Denver, 210 U. S. 373, 385, 52 L. ed. 1103, 1112, 28 Sup. Ct. Rep. 708;
Coe v. Armour Fertilizer Works, 237 U. S. 413, 425, 59 L. ed. 1027, 1032, 35 Sup. Ct. Rep. 625;
Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663;
Kentucky R. Tax cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57;
Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 537, 40 L. ed. 247, 251, 16 Sup. Ct. Rep. 83;
Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825;
Glidden v. Harrington, 189 U. S. 255, 47 L. ed. 798, 23 Sup. Ct. Rep. 574;

Hibben v. Smith, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88;
Security Trust & S. V. Co. v. Lexington, 203 U. S. 323 51 L. ed. 204, 27 Sup. Ct. Rep. 87;
Central R. Co. v. Wright, 207 U. S. 127, 52 L. ed. 134, 28 Sup. Ct. Rep. 47.

IV.

Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings for taxation. But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal.

Londoner v. Denver, supra;
Pittsburg, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 426, 38 L. ed. 1031, 1036 14 Sup. Ct. Rep. 1114;
Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 171 et seq., 41 L. ed. 369, 393, 17 Sup. Ct. Rep. 56.

V.

Where a legislature attempts to confer upon a subordinate body, authority to enlarge or repair a previously constructed ditch, either by widening its banks, deepening its channel or lengthening it, and to assess the cost and expense to adjacent property without notice to or opportunity to be heard by interested property owners, the statute is unconstitutional as offending against the due process clause of the 14th Amendment.

In re Renville County, 109 Minn. 88, 122 N. W. 1120;
Harmon vs. Bolley, 120 N. E. 33 (Ind.).

1. The old ditches were materially deepened.

(a) The contract for the work called for a deepening of the old ditches (R. 68-69-70).
(b) The opinion of the Supreme Court conceded the fact, i. e.:
"the contractor * * * in certain places, increased the depth of the excavation below its original grade." (R. p. 89.)
"It is to be conceded that the channels were not only reopened, cleaned and emptied of silt and obstructions, but were in part, to some extent, *materially deepened.*" (Italics ours) (R. p. 89.)
(c) The pleadings of the defendants in error other than Hiatt, the contractor (who claimed he had insufficient knowledge to affirm or deny and therefore demanded

strict proof) admitted the charge that the contract with Hiatt was made so that the ditches could be deepened. (R. p. 18, l. 4.)

(d) The undisputed testimony in the case is that the ditches were deepened:

"We made it (the ditch) about three feet deeper throughout the length of Branch "A" (R. 23.)

"From the Milwaukee to the outlet (we) lowered it fully a foot and a half."

"It was two and a half feet deeper than as originally constructed." (R. 28.)

Hiatt, the contractor, admitted that he dug the ditches at least a foot below the original grade. (R. 48, 64, 65.)

2. The old ditches were materially widened.

(a) The undisputed testimony is that the ditches in the district were widened.

Hiatt, the contractor, testified they were widened "about two feet." (R. 64.)

Carter, the employee of Hiatt, at the time of the trial testified: "We made it fully five and one-half feet wider at the bottom with a slope." (R. 23.)

The engineer who cross-sectioned the ditch and whose evidence was undisputed testified Branch "A" had been widened on an average 4.8 feet or 25% greater than the original width. (R. 59.)

(b) The pleadings of the defendants in error other than Hiatt, the contractor, (who claimed he had insufficient knowledge to affirm or deny) admitted that the ditches were widened. (R. p. 18.)

(c) The opinion of the Supreme Court of Iowa concedes there was a widening of the ditches, i. e.:

"The contractor * * * in places sought to insure greater permanency of the banks of the ditch by increasing their slope and to that *extent increased the original width of the channel.* (Italics ours.)

3. The ditches were materially lengthened and extended.

(a) The bill alleged the ditches were lengthened and extended which was admitted by defendants in error, except Hiatt, as hereinbefore mentioned, he neither denying or affirming.

(b) The undisputed testimony is that the ditch was lengthened or extended. (R. 37 and 63.) The only disputed matter if it may so be called was whether Hiatt had claimed or received warrants for the lengthening or extension. On his cross examination, however, he admitted it (R. 66) and an estimate was given him for the

work (R. 66) and on that he received a warrant (R. 67) and it is further shown by Exhibit P. (R. 36) and the cost was included in the assessment (R. 36 and 67).

(c) The opinion of the Supreme Court of Iowa both admits and denies our claim, i. e.:

"There is also evidence of some original excavation at the outlet." (R. p. 89.)

"It further appears that the contractor extended the excavation beyond the district limits a short distance * * *." (R. p. 89.)

"The charge in the plaintiff's petition and repeated in argument that the work contracted for and done included a lengthening or extension of the ditch or ditches beyond their original dimensions is not justified by the record." (R. p. 89.)

VI.

The enlargement of a ditch already constructed, either by widening, deepening, or extending it, would, for all practical purposes, constitute a new ditch, depending perhaps upon the extent of the enlargement.

In re Renville County, 109 Minn. 88, 122 N. W. 1120, 1121.

VII.

A deepening of one foot for a part of a ditch's length beyond the original depth has been held a *material deepening*, so as to require notice and hearing of assessments to be levied for the cost.

In re Renville County, 114 Minn. 281, 130 N. W. 1103.

VIII.

There is a distinction between repairing a ditch, by removing obstructions therefrom, and widening or deepening or extending it.

In re Renville County, 109 Minn. 88, 122 N. W. 1120, p. 1121;
Harbough vs. Martin, 30 Mich. 234;
Lanning v. Palmer, 117 Mich. 529, 76 N. W. 2;
Taylor v. Crawford, 72 Ohio St. 560, 74 N. E. 1065, 69 L. R. A. 805;
Fries v. Brier, 111 Ind. 65, 11 N. E. 958;
Romack v. Hobbs, (Ind.) 32 N. E. 307;
Weaver v. Templin, 113 Ind. 298, 14 N. E. 600;
People ex rel. Munsterman v. McDougal, 205 Ill. 636, 69 N. E. 95;
Denyer v. Shonert, 1 Ohio C. C. 73;
Taylor v. Brown, 127 Ind. 293, 26 N. E. 822.

IX.

The Supreme Court of Iowa has repeatedly held that land within a drainage district can be assessed for improvements made therein only for the actual (not theoretical) benefits accruing to the particular tracts of land within the district.

Jenison v. Greene County, 145 Iowa, 215, 123 N. W. 979;
In re: Johnson Drainage District, 141 Iowa, 380, 118 N. W. 380;
Rystad v. Drainage District, 157 Iowa, 85, 137 N. W. 1030;
Theilen v. Board, 179 Iowa, 248, 160 N. W. 915.

X.

The Supreme Court of Iowa has consistently held that in passing on the equality of the assessment, the depth of the improvement as affording outlet to lands, should be taken into consideration, and where a ditch has been cleaned out or deepened, consideration should be given to the adequacy of the original ditch prior to the cleaning out or the deepening, as furnishing an outlet for lands in making assessments therefor.

Harriman v. Board, 169 Iowa 324, 151 N. W. 468;
Monson v. Board of Supervisors, 167 Iowa, 473, 149 N. W. 624;
Theilen v. Board, Supra;
Pollock v. Story County, 157 Iowa, 232;
Obe v. Board of Supervisors, 169 Iowa, 449;
Bibler v. Board, 162 Iowa, 1;
O'Donnell vs. Board, 184 Iowa, 1360, 169 N. W. 660.

XI.

The levying of a special assessment imposing a burden upon lands without a compensating advantage is not due process of law.

Myles Salt Company v. Board of Commissioners, 239 U. S. 478; 60 Lawyer's Ed. 392;
Gast Realty & I. Company v. Schneider Granite Company, 240 U. S. 55; 60 Lawyers' Ed. 523;
Fallbrook Irrigation District v. Ridley, 104 U. S., 112; 41 Lawyers' Ed. 369;
Norwood v. Baker, 172 U. S. 269, 43 Lawyers' Ed. 443.

XII.

Where the question arises, whether the basis of fact upon which the state court rested its decision denying the asserted

Federal rights has any support in the evidence, it is this Court's duty to review, and to correct where there is error.

Postal Tel. Cable Co. v. Newport, 247 U. S. 464, 62 L. ed. 1215, 38 Sup. Ct. Rep. 566;
Southern P. Co. v. Schuyler, 227 U. S. 601, 611, 57 L. ed. 662, 669, 33 Sup. Ct. Rep. 277;
North Carolina R. Co. v. Zachary, 232 U. S. 248, 259, 58 L. ed. 591, 595, 34 Sup. Ct. Rep. 305;
Carlson v. Washington, 234 U. S. 103, 106, 58 L. ed. 1237, 1238, 34 Sup. Ct. Rep. 717;
Norfolk & W. R. Co. v. West Virginia, 236 U. S. 605, 610, 59 L. ed. 745, 748, 35 Sup. Ct. Rep. 437;
Interstate Amusement Co. v. Albert, 239 U. S. 560, 567, 60 L. ed. 439, 443, 36 Sup. Ct. Rep. 168;
Ward v. Love County, 64 L. ed. U. S. Advance Opinions, 492 issue of June 1, 1920.

XIII.

If non-Federal grounds, plainly untenable, may be put forward successfully, this Court's power to review might easily be avoided.

Ward v. Love County, Supra;
Terre Haute & I. R. Co. v. Indiana, 194 U. S. 579, 589, 48 L. ed. 1124, 1129, 24 Sup. Ct. Rep. 767.

XIV.

A state Court cannot, by omitting to pass upon the basic questions of fact, deprive a litigant of the benefit of a federal right, any more than it could do so by making findings that were wholly without support in the evidence. And this court, where its appellate jurisdiction is properly invoked and all the evidence is brought before it, will, if necessary for a decision of a federal question, examine the entire record in order to determine whether there is evidence to support the findings of the state court, so it is also its duty in the absence of adequate findings to examine the evidence in order to determine what facts might reasonably be found therefrom, and which would furnish a basis for the asserted federal right.

Carlson v. Washington, Supra.

XV.

Where a state court expressly holds that a statute gives a Board of Supervisors the authority to enlarge, reopen, deepen, widen, and straighten ditches within a drainage district and to assess the cost thereof upon the lands therein, without notice and without an opportunity for hearing by the interested land owners, the statute deprives the landowners of

their property without due process of law, contrary to the 14th Amendment to the Constitution of the United States, and the statute should be held invalid by this court and the assessments levied void.

See authorities under points III, IV and V.

1. As the Iowa Supreme Court held:

> "The contract between the Board and Hiatt to which the plaintiffs object, appears to be fairly and clearly within the scope of the power and responsibility conferred by this section. Even if the terms of the contract be as broad and comprehensive as plaintiffs say they are, they are still not in excess of the authority expressly given to "enlarge, reopen, deepen, widen and straighten" the completed ditches for the purpose of keeping them in repair and maintaining them in efficient working order. The statute imposes no duty to give notice in advance of each separate work of repair, or to advertise the same for competitive bids—except, perhaps, as may be implied in the proviso at the end of the section which seems to recognize such necessity where additional right of way is to be taken and this reservation is sufficient, in our judgment, to obviate any possible objection on constitutional grounds."

It would seem that under the facts as stated by the Supreme Court of Iowa that this Court must necessarily hold that Sec. 1989-a-21 of the statutes of Iowa does not provide for due process and is therefore void, as the constitutional validity of a statute is to be tested, not by what has been done under it, but by what may by its authority be done.

Stuart v. Palmer, 74 N. Y. 183, p. 188.

ARGUMENT.

In general, where deprivation of liberty or property is involved, the essentials of due process of law upon both sides of the Atlantic are notice and hearing. *Painter v. Liverpool Gas Co.*, 3 Ad. & El. 433; *Stuart v. Palmer*, 74 N. Y. 183; *In re Renville County, (State v. Maguire)*, 109 Minn. 88, 122 N. W. 1120; *Londoner v. Denver*, 210, U. S. 373.

One familiar exception to this is found in those cases where the immediate exigencies of police protection sanction summary deprivation of property without any hearing whatsoever. *N. A. Cold Storage Co. v. Chicago*, 211 U. S. 306.

But it is well settled that the mere fact that administrative officials are invested with powers involving deprivation of property in their exercise, does not justify such deprivation upon mere official fiat, without hearing. *Stuart v. Palmer, Supra; Londoner v. Denver, Supra; In re: Renville County,*

Supra; Turner v. Wade, L. ed. Advance Opinions October 1920 term, issue of December 1, 1920, page 23.

In *Central of Georgia v. Wright,* 207 U. S. 127, 52 L. ed. 134, this Court said:

> "Former adjudications in this Court have settled the law to be that the assessment of a tax is action judicial in its nature, requiring for the legal exertion of the power such opportunity to appear and be heard as the circumstances of the case require." *Davidson v. New Orleans,* 96, U. S. 97; 24 L. ed. 616; *Weyerhaueser v. Minn.,* 176 U. S. 550; 44 L. ed 583; Supra Ct. Rep. 485; *Hagar v. Reclamation Dist. 108,* 111 U. S. 701; 28 L. ed. 569, 4 Supra Ct. Rep. 663.
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> "In the late case of *Security Trust & S. V. v. Lexington,* 203 U. S. 323, 51 L. ed. 204, 27 S. Ct. Rep. 87, decided at the last term of this court, the subject underwent consideration, and it was there held that, before an assessment of taxes could be made upon omitted property, notice to the tax payer, with an opportunity to be heard, was essential, and that somewhere during the process of the asesssment the taxpayer must have an opportunity to be heard, and that this notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace."

In *Turner v. Wade,* reported in 65 L. ed. Advance Opinions of December 1st, 1920, page 23, this court had before it the constitutional validity under the due process clause of the 14th Amendment of a certain provision of the Georgia Tax Equalization Act. The Georgia statutes provided that the Board of Assessors were to meet at a time stated to assess the tax returns and if the valuation was unfair to make a fair valuation of the property and upon change being made that notice should be given the taxpayer and if dissatisfied he might demand an arbitration, the tax payer to select one arbitrator, the Board another and the two, a third; the decision of the two arbitrators being binding. In this case arbitration was had, but each of the three arbitrators placed a different valuation on the property; and it was further provided by the statute that if the arbitrators did not render decision within ten days from the naming of the arbitrator by the Board of Assessors the decision of the board of assessors should stand and be binding in the premises. In the course of its opinion in that case, this Court said:

> "In considering certain sections of the Georgia tax laws, this Court held in *Central of Georgia R. Co. v. Wright,* 207 U. S. 127, 52 L. ed. 134, 28 S. Ct. Rep. 47, 12 Annotated cases 463, that due process of law requires that

after such notice as may be appropriate, the tax payer have opportunity to be heard as to the validity of the tax and the amount thereof by giving him the right to appear for that purpose at some stage of the proceedings. This case, with others, was cited with approval in *Londoner v. Denver*, 210 U. S. 373, 385, 52 L. ed. 1103, 1112, 28 Sup. Ct. Rep. 708 wherein we said that if the legislature of the state, instead of fixing the tax itself, commits to the subordinate body the duty of determining whether, and in what amount and upon whom, the tax shall be levied, due process of law requires that at some stage of the proceedings, before the tax becomes irrevocably fixed, the tax payer must have the opportunity to be heard, of which he must have notice whether personal, by publication, or by some statute fixing the time and place of the hearing. See 210 U. S. 385, and previous cases in this Court cited on page 386. See also *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 425, 59 L. ed. 1027, 1032, 35 Sup. Ct. Rep. 625. * * *

"In the present case, as the facts already stated show, the tax payer is subject to assessment made without notice and hearing. In that situation we are clear that the case comes within the decision of this Court, in *Central Georgia R. Company v. Wright, Supra*, and kindred cases, and not within that line of cases where statute has fixed the time and place of hearing, with opportunity to the tax payer to appear and be heard upon the extent and validity of the assessment against him."

It is of course well settled law that some requirements which are essential in strictly judicial proceedings, are not always requisite in tax proceedings. But a requisite which is essential in both judicial and tax proceedings is notice and hearing. In *Londoner v. Denver* 210 U. S. 373, 385, this court said:

"Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings for taxation. But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal." *Pittsburg, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 426, 38 L. ed. 1031, 1036, 14 Sup. Ct. Rep. 1114. *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 171 *et seq.*, 41 L. ed. 369, 393, 17 Sup. Ct. Rep. 56.

In the instant case the Iowa legislature (as the statute is construed by the Supreme Court of Iowa) attempted to confer upon the Board of Supervisors, it being the governing

body of all drainage districts within the County, an authority to *repair* and to materially alter a previously constructed ditch, either by enlarging, reopening deepening, widening, straightening or lengthening, and to assess the cost to lands within the district without notice to or opportunity to be heard by interested property owners. That the statute offends against the due process clause of the Federal constitution appears clear on authority. It is to be remembered, of course, that the constitutional validity of the law is to be tested, not by what has been done under the statute, but by what may by its authority be done. (*Stuart v. Palmer*, 74 N. Y. 183 p. 188.)

The Minnesota Court in *re Renville County*, 109 Minn. 88, 122 Northwestern Reporter 1120, 1121, distinctly holds that a Statute giving a right to enlarge a previously constructed ditch by widening its banks or deepening its channel without notice violates the constitutional provision as to due process of law. The Court said:

> "The objection to the validity of the statute is that it makes no provision for notice to interested parties or otherwise affords them an opportunity to be heard upon questions affecting the propriety and necessity of the improvement authorized to be made under the statute, and is therefore unconstitutional and void as depriving those against whom assessments are made of their property without due process of law. The statute, a part of the drainage act of 1905, provides that after the construction of any ditch the board of county commissioners of the proper county shall keep the same in repair and free from obstructions, and authorizes the widening or deepening thereof, if in the judgment of the board necessary to answer the purpose of its construction. It further provides that the costs and expense of such improvements shall be paid from the general revenue fund of the county, reimbursing that fund by special asesssments upon benefited property. As urged by counsel for appellant, the statute contains no provision for notice to interested parties, or from an appeal from the action of the board, or any other method or opportunity by which the landowners may be heard at any stage of the proceedings. In short, the proceedings under this section are wholly ex parte.
>
> "We are of the opinion that the Statute, in so far as it attempts to clothe the board of commissioners with ex parte power and authority to enlarge, by widening or deepening, a ditch theretofore constructed, is unconstitutional and void by reason of its failure to provide some kind of notice to those who are required by the statute to defray the expense of the improvement, or afford

them an opportunity at some stage of the proceedings to be heard upon all questions necessary to be determined in order to justify the proposed work. It is clear that the original proceeding could not be authorized by the Legislature without some provision for notice or opportunity to be heard upon these questions. (28 Cyc. 979; Hamilton on Special Assessments, 141); and it is equally clear that the enlargement of a ditch already constructed, either by widening or deepening it, would, for all practical purposes, constitute a new ditch, depending, perhaps, upon the extent of the enlargement. There is a distinction between repairing a ditch, by removing obstructions therefrom, and widening or deepening it. *Harbough v. Martin*, 30 Mich. 234; *Lanning v. Palmer*, 117 Mich. 529, 76 N. W. 2; *Taylor v. Crawford*, 72 Ohio St. 560, 74 N. E. 1065, 69 L. R. A. 805, and cases cited in note. In some of the States it has been held that even in the case of ordinary repairs, notice and opportunity to the landowner to be heard at some point in the proceedings is essential to the validity of a statute authorizing the same (*Campbell v. Dwiggins*, 83 Ind. 473) though the authorities on the point are not in harmony. But we find no conflict upon the proposition that authority to enlarge a ditch, either by widening its banks or deepening its channel, must be upon notice of some kind. *Fries v. Brier*, 111 Ind. 65, 11 N. E. 958; *Weaver v. Templin*, 113 Ind. 299, 14 N. E. 600; *Dauyer v. Shonert*, 1 Ohio Cir. Ct. Rp. 73; *Owensburg v. Brocking*, (Ky.) 87 S. W. 1086; *Romack v. Hobbes*, (Ind.) 32 N. E. 307.

"If the statute under consideration authorized ordinary repairs only, such as removing obstructions and accumulations of foreign substances in the ditch, we would follow the rule of the Iowa court and some of the other states to the effect that provision for notice to the owners of adjoining property is not essential to the validity of the statute. *Yeomans v. Riddle*, 84 Iowa 147, 50 N. W. 886. We practically so held in the case of *McMillan v. County Com'rs*, 93 Minn. 16, 100 N. W. 384, where section 25, c. 258, p. 427, Laws 1901, was construed and upheld, though the precise point does not seem to have been raised. The cost and expense of ordinary repairs, the removal of rubbish and obstructions, if properly made from year to year, would be inconsiderable, and no serious burden to property owners, and a requirement of notice and other proceedings essential to an original undertaking would be impractical, render the work of the board unnecessarily cumbersome, and serve no substantial purpose. And, as suggested, if this statute were so limited, notice would be held unnecessary. But it is not so limited. On the contrary, the statute not only authorizes

repairs, but grants to the board the further power to enlarge the ditch by widening its banks or deepening its channel."

This case was re-affirmed on a second appeal and upon a showing that the ditch was deepened one foot, part of its length, the assessment was held to be unconstitutional. *In re Renville County,* 114 Minn. 281, 130 N. W. Rep. 1103.

Until the decision by the Supreme Court of Iowa in the instant case, that court had held that in such a case as the present, notice and hearing to the taxpayer was a prerequisite. *Lade v. Board of Supervisors,* 183 Iowa 1026, 166 N. W. 586. However, it should be said that the Supreme Court of Iowa in the *Lade* case held that the statute here involved had been superseded by another statute (Sec. 1989-a-11) it being claimed that the Statute, Sec. 1989-a-11 was a later statutory enactment, and that statute expressly provided for notice and hearing. In the instant case, the Court held that the statute in controversy here being 1989-a-21 had not been superseded by Sec. 1989-a-11.

In the *Lade* case the court speaking through Justice Salinger said:

> "While it is true the board of supervisors has authority to have an existing ditch widened and deepened, and to make assessment for the costs thereof, this may be done only if notice be given and none was given. See Code Supplement, Sec. 1989-a-11, as amended by Section 10, Chapter 118, 33 G. A., and Section 4 of Chapter 87, 34 G. A., which was the law at the time involved in this controversy; Section 1989-a-21 having been superseded by said Section 1989-a-11. So it does not matter that the work actually done might have been authorized, or that it was of benefit to these plaintiffs, and the sole question at this point is whether that for which it is sought to charge these plaintiffs was in fact no more than repairing and cleaning. If it was not repairing and cleaning, but widening and deepening, the cancellation of the assessment in review was justified."

This is further emphasized in the following statement:

> "An assessment having been made wholly on the ground that cleaning and repairing was to be paid by it, such assessment must be cancelled if in general substance the work done was not cleaning and repairing, and was of a character for which notice was not given as by law required."

And, again in that case, it is said:

> "The plaintiffs knew that widening and deepening could not lawfully be engaged in at their cost, unless they had been served with notice and knew they had not been so served."

It would seem clear enough that the "repair", or "reopening", is a restoration of the improvement to its original condition. An enlargement of any sort, whether widening or deepening or lengthening, it seems to us, cannot be legitimately considered a "repair".

That the Court may have before it the statute Sec. 1989-a-11 referred to in the *Lade* opinion, we set it out in the margin below. (1)

In the present cause the plaintiffs in error (plaintiffs below) in presenting their cause to the Supreme Court of Iowa cited and relied on *Lade v. Board, Supra.* It is conceded in the record that no notice was ever given the plaintiffs in error; that they were not given an opportunity to object to the work to be done and that they were not given the opportunity to contest the validity or the amount of the assessment for the work done. In the instant case, the Supreme Court of Iowa

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(1). Sec. 1989-a-11. Changes in dimensions—notice —objections—appeal.

"If after the establishment of said district, and before the completion of the drainage improvements therein it shall become apparent that a levee or drain should be enlarged, deepened or otherwise changed or that a change or alteration in the location should be made for the better service thereof, said board may by resolution authorize such change or changes in the said improvement as the engineer shall recommend; provided that, whenever any change or changes are made either under this section or under any other section of this chapter, all persons whose land shall be taken or whose assessments shall be increased thereby shall first have been given like notice as provided in section nineteen hundred eighty-nine-a three of this chapter, and shall have like opportunity to file claims for damages, as provided for in section nineteen hundred eighty-nine-a four of this chapter, or file objection to such assessment as provided in section nineteen hundred eighty-nine-a twelve of this chapter, as the case may be, and like opportunity to appeal from the action of the board as provided in section nineteen hundred eighty-nine-a six of this chapter, or section nineteen hundred eighty-nine-a fourteen of this chapter, as the case may be."

found that there was a deepening and a widening in certain places and that

> "the channels were not only reopened, cleaned and emptied of silt and obstructions but were in part to some extent materially deepened."

The following language, taken from the opinion of the Supreme Court of Iowa, would appear to concede, what cannot be disputed, that the work, for which the assessments were imposed, was not a mere work of repair—not the removal of obstructions from the original ditch—but was for the work of an enlarged ditch, and that a substantial part of the assessment sought to be enjoined is imposed for the purpose of raising money to pay for enlarging the original ditch, by both *deepening* and *widening* it:

> "Under the direction of the engineer, or in pursuance of the plans furnished by him, the contractor also in certain places, *increased the depth of the excavation* below its original grade and in other places sought to insure greater permanency of the banks of the ditch by *increasing their slope* and to that extent *increased the original width* of the channel. There is also evidence of some *original excavation at the outlet.*"

It is true that a little later on the Court says:

> "The change in the plaintiff's petition, and repeated in argument, that the work contracted for and done, included a lengthening or extension of the ditch or ditches, beyond their original dimension, is not justified by the record, but as we have said it is to be conceded that the channels were not only reopened, cleaned and emptied of silt and obstructions, but were in part, to some extent, materially deepened."

The statement of the court above quoted to the effect that the record does not justify the claim that the ditch was lengthened and extended is surely an inadvertence on the part of the Court. For the record does in fact show the claim was fully sustained, and even the opinion of the court shows it. We quote from the opinion (R. 89, lines 14 to 17):

> "There is also evidence of some original excavation at the outlet.
>
> "It further appears that the contractor extended an excavation beyond the district limits a short distance in order to facilitate the successful operation of the drainage system."

Furthermore, the record shows the following:

(Testimony of Hiatt, the contractor) "I couldn't say just the time I dug this outlet in Calhoun County. I did the work during the time the work was done between Station 0 and 115. I was given an estimate of 11,000 yards of excavation from station 0 to 115. Station 0 began at the extreme end of the ditch as originally built. *If anything was added to the estimate from 0 to 115, it would necessarily include that beyond 0, or the new ditch. I know,* that I got an estimate that covered more than between stations 0 and 115. Any work I did below Station 0 was not recleaning, but reconstruction work. I personally received those identical estimates marked Exhibit "P" from Warrington (the engineer) and filed them as evidence on which I was entitled to warrants. When I got the warrants from the Auditor I got them because of presenting these estimates. I had no right to be paid for work outside the county. I dug that outlet *below* Station 0 about *two feet deep, twenty feet wide, two hundred fifty feet long.*

It is thus apparent that the Court was in error in one portion of the opinion in stating that there was no extension, as it does concede later in the opinion that there was an extension. But where it makes this concession, the Court again falls into error in stating that the contractor neither asked nor received compensation. We quote the opinion:

"There is also evidence of some original excavation at the outlet. It further appears that the contractor extended an excavation beyond the district limits a short distance in order to facilitate the successful operation of the drainage system, but for this work he testifies he neither asked nor received compensation and his statement does not appear to be disputed."

It is true that in direct examination Mr. Hiatt stated he made no claim for and had received no compensation for the work of the extension. But in cross examination, as hereinbefore set out he admits he got the estimates, and that the work was included on estimate "P" and that he got a warrant therefor. (Estimate P. is shown at pages 36-37 R.)

Inasmuch as the statements in the Opinion are somewhat hesitantly made, in so far as stating fully the enlargement of the ditch, we wish to call attention to the record upon this point. That there may be no question in the mind of the Court as to what the facts were we set out below the facts, and facts which are undisputed in the record.

The ditches were materially deepened, widened and lengthened.

S. F. Moeller, an engineer who had cross-sectioned the ditch, and whose testimony is not disputed, said (R. p. 59):

> "If the ditch had been excavated to the original dimensions it would have required the removal of some 709 cu. yds. That would replace the ditch the same dimensions for which Hiatt was originally paid for construction. I have further examined Mr. Warrington's field notes in reference to this branch A for the purpose of ascertaining what difference, if any, there was, in the bottom width of the Branch as reconstructed by Hiatt and the bottom width as shown in the original estimate or field notes upon which the original estimate was based. I examined the ditch as it exists for top and bottom width in April, 1915. I found the top and bottom width both are wider than originally planned. I find the average top width 20.2 feet from my survey. The average top width of the estimate originally from Mr. Warrington's notes is 15.4 feet. As found on my survey the bottom width average 8.4 feet. * * *
>
> Q. Do you know the original bottom width shown by Warrington's original estimate?
>
> A. Original plans are four foot bottom.
>
> Q. And you found the bottom actually, on your survey, to have average width of 8.4 feet?
>
> A. Yes, sir."

The Court will please note that, by actual measurements of an engineer, the average top width of the ditch was increased from 15.4 feet to 20.2 feet, that is twenty-five (25) per cent. The bottom width from 4.8 feet to 8.4 feet, obviously a very material increase.

The Court will also notice the reference to 709 cubic yards in the evidence quoted. This is the amount of yardage the removal of which would have been required to restore the ditch to the original dimensions. As we shall know a little later, the assessment upon this portion of the ditch (Branch A) includes the cost of removing—not merely 709 cubic yards, but of 3599 cubic yards. Thus the enlargement of this particular ditch, of the system of ditches, took out more than five times the amount of yardage that would have been required to restore the ditch to its original dimensions. Every yard beyond the 709 yards took new right of way. The original ditch was of the dimensions of the original plan, and no more. The establishment of this improvement gave the right to construct, and keep in repair, a ditch of a certain dimension. The right of way was obtained by "establishing" the original plan and design of a ditch; that right of way had its bound-

aries exactly co-extensive with the boundaries of the improvement thus designed when so established. If there is a right to go beyond those boundaries and take out an additional 2800 or 2900 cubic yards upon this Branch A, 2300 feet long, what objection is there to taking out twice, or ten times, that amount? The enlargement is certainly a material enlargement. The few thousand square feet, which will thus be taken out of the control of the adjoining proprietors and belong to the District because it represents right of way, are quite as valuable as any other few thousand square feet of the property of the riparian proprietor, and once it is established that the constitution does not safeguard a taking, if in the opinion of the Board, or of the Court, the taking is in moderation, although a material and substantial invasion, then, of course, from that time on the constitutional safeguards may as well be abolished. They no longer afford any protection. Likewise, if notice is not required where additional right of way is taken, that is to say, where the ditch is enlarged and substantially changed, because it seems to the Board, or to the Court, that the case is not a very extreme one and that the taking has been, for example, only a matter of a few acres, leaving the greater part of the land to its proprietor, then there is no reason for stopping short of a position that ignores the constitution altogether and declares that property may be taken without notice and hearing including "taking" by way of special assessments.

There is no doubt of the enlargement. We have referred especially to Branch A because the facts are brought out so clearly in respect of that particular line of ditch that there is no use in gainsaying the record. But in principle the entire contract was in the same case.

The evidence of the drainage engineer that we quoted is the result of actual measurements. Carter, who actually had charge for the contractor of the work, said (R. p. 23):

> "Between these two points at the outlet I made from the outlet to the north side of the Milwaukee track with team and scraper and from there on up as far as we went I sloped the west side with team and scraper. Mr. Hiatt was working there then over on the other side cleaning out. I cleaned the west side and he the east side.
>
> Q. Describe as best you can how much you enlarged that ditch?
>
> A. Why we made it about three feet deeper and fully five and one-half feet wider at the bottom with a slope—Oh, we must have sloped it one and one-half to the foot. Sam cleaned out the bottom and I sloped on the west side with team and scraper. I went down the side of the ditch about three feet. This continued throughout the length from the Chicago, Milwaukee and St. Paul track north, as far as we went on Branch A.

Q. I want to know whether you dug the ditch deeper than originally constructed?
A. Yes, sir.
Q. How much deeper?
A. About three feet."

We wish to impress upon the Court the fact that this evidence is not disputed. The defendant in error, Hiatt, does not really deny the evidence to which we have referred. True, he estimates the "probable" enlargement as somewhat less than the engineer measured it, or than Carter, who did the work, says it was done. He said, (R. p. 64):

"Branch A was made wider probably two feet on top. A foot or six inches on the bottom. The original bottom width when first constructed I thought was four feet. It was made probably one and one-half feet wider and the second time probably one and one-half feet at the bottom. * * * The members of the Board who gave us instructions were Mr. Dooley. He told us to take out what would fill in. Mr. Dooley visited the ditch frequently. Gave me instructions. Followed these instructions as nearly as I could. Lieb visited the work; gave us instructions. Followed those instructions. Warrington visited the ditch. Gave us instructions and I followed those instructions.

Q. Now after you had followed the instructions of Lieb, Dooley and Warrington, Branch A for example, you then left as you finished that branch, a certain sized ditch a certain cross section?

A. Yes, sir.

I cannot tell you how many yards I took out of Branch A. I don't know as I ascertained the number of yardage I was entitled to in Branch A.

Q. You do not really claim now that you are entitled to any more money for the excavation on A than the original contract called for?

A. No.

Q. You do know if you get the balance of these warrants you are now claiming you will be paid for some 3599 cubic yards on Branch A?

A. Believe that is it.

Q. You are now claiming to get 28 cents a yard for 3599 cubic yards in Branch A?

A. Yes, sir.

Q. And want it in this suit?

A. Yes.

Q. And expect these plaintiffs and other taxpayers to pay you for this yardage?

A. Yes, sir."

Your Honors will notice that, notwithstanding he estimates the "probable" enlargement as less than the measurement showed it to be, that he admits that he is claiming, and there is involved in this assessment which plaintiffs seek to enjoin, charge for 3599 cubic yards of earth that he took out of Branch A. We have already called attention to the fact that 709 cubic yards would have made it as big as it originally was. Warrington planned it larger than the original. That is, he planned to have 936 cubic yards taken out of Branch A, and the contract, which was signed, called for that (R. p. 69):

> "In addition to the above mentioned work in the lower end of said district, second party agrees to clean, reopen and repair Branch "A" of said district from Sta. Zero to Sta. 23 as specified in the engineer's report approximating about 836 cubic yards in said Branch "A", the same to be done as part of the lower end of said district, and to clean, reopen, deepen and repair said drainage improvement from Sta. 402 to Sta. 500 as specified in said engineer's report and approximating about 7317 cubic yards, and herein called the upper end of said district, agreeing to clean, reopen, and deepen said improvement according as the same is specified by said engineer's report."

Your Honors will notice the contract was not for a mere repair, but for an enlargement.

The following quotation from the contractor's own testimony and admissions calls attention to the fact that it was admittedly dug wider and dug deeper. (R. p. 65, 19th l. on p. 66):

> "I figured that the work in Branch A would be what Warrington told me and what the report showed and what the contract showed. I did not know what Warrington's plans were in June, 1911, for excavation of Branch A. Never found out. I did not consult my contract to see what yardage I would have to dig out of Branch A. I don't remember just what the contract does say in regard to A.
>
> Q. Will you refresh your recollection from the Contract Exhibit "X" and state if the yardage you were to take out of Branch A was 936 yards?
>
> A. Yes, I remember seeing that in the contract.
>
> Q. But you are now claiming for just one yard less than 3600 yards; practically four times the amount con-

templated taking out when the contract was made, are you not?

A. Yes, sir.

Q. So at the time you made contract there was about 936 yards necessary to be taken out in order to put it in original shape?

A. Yes, sir.

Q. What happened after you made that contract between that time and the time you dug the ditch to make it necessary to dig four times as much yardage out of the ditch to put it in the condition it was in originally?

A. Conditions of the soil.

Q. What were they?

A. The ditch was, as I said before, filled up but it was a soft marshy soil and in order to make the ditch stand that it had to be dug wider and we dug it deeper, so if it filled any we would still retain our grade. This additional size I gave to Branch A was the sole solicitation of Mr. Dooley. He was the only one that had me do anything extra. He was on the job very frequently. We had nicely got started and he came and said we were leaving the ditch too straight. Wanted the banks sloped. I thought he was right, the banks needed sloping, so we sloped them. I really trusted my own judgment in making this aditional excavation regardless of Warrington's instructions. I felt that I should do all in my power to make a good ditch. I figured I would naturally be paid for what I did and figured to make as good a ditch as possible. When I first dug Branch A I dug an average depth of three feet. The bottom was originally planned to be four. The side banks had a slope of one and one-half to one."

As clearly as any matter could be established the enlargement is shown by the facts to have included (1) Deepening (2) Widening (3) Lengthening of the old ditches in the district.

Statements in the opinion of the Supreme Court of Iowa in the instant case suggest that that court regards a *material* enlargement, at least by *deepening*, of a drain is not necessarily a factor of consequence in the apportionment of the tax, and on that theory that the right of due process is not infringed. We think that it may easily be demonstrated that this is a wholly erroneous view. It often occurs that a ditch, efficient in serving most of the property within the drainage district, is inadequate for thorough or effective drainage in respect of one or more bodies of relatively lower land because not sufficient depth can be obtained for the drain tile for first

class results and an adequate fall or grade obtained to a connection with the public drain. Section 1989-a-12 (Set out below) requires that

"the lands receiving the greatest benefit shall be marked on a scale of one hundred, and those benefited

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Sec. 1989-a-12. Assessment of costs and damages—apportionment. When the levee or drainage district or other improvement herein provided for shall have been located and established as provided for in this act, or when it shall be necessary to cause the same to be repaired, enlarged, reopened or cleared from any obstruction therein, unless such repairs, reopening or clearing of obstructions can be paid for as hereinafter provided, the board shall appoint three commissioners, one of whom shall be a competent civil engineer and two of whom shall be resident freeholders of the state not living within the levee or drainage district and not interested therein or in a like question, nor related to any party whose land is affected thereby; and they shall within twenty days after such appointment begin to personally inspect and classify all the lands benefited by the location and construction of such levee or drainage district, or the repairing or reopening of the same, in tracts of forty acres or less according to the legal or recognized subdivisions in a graduated scale of benefits, to be numbered according to the benefit to be received by the proposed improvement; and they shall make an equitable apportionment of the costs, expenses, costs of construction, fees and damages assessed for the construction of any such improvement or the repairing or reopening of the same and make report thereof in writing to the board of supervisors. In making the said estimate the lands receiving the greatest benefit shall be marked on a scale of one hundred and those benefited in a less degree shall be marked with such percentage of one hundred as the benefit received bears in proportion thereto. This classification when finally established shall remain as a basis for all future assessments connected with the objects of said levee or drainage district, unless the board, for good cause, shall authorize a revision thereof. * * * If the first asessment made by the board of supervisors for the *original cost or for repairs* of any improvement as provided in this act *is insufficient*, the board may make an additional assessment and levy in the same ratio as the first for either purpose.

in a less degree shall be marked with such percentage of one hundred as the benefit received bears in proportion thereto."

And the provision found in the same section that the classification "shall remain as a basis for all future assessments" is significantly qualified by the words: "Connected with the objects of said levee or drainage district." The apportionment of the costs and expenses is to be made in the ratio of benefits. Of course, it needs no elaboration to prove that a material change in the depth of the ditch may, and almost inevitably does, alter the relative benefits to the various tracts of land and their owners. An increase of one to three feet in the depth of the ditch often does, and in this case certainly did, benefit in an extraordinary degree certain tracts of land because adequate drainage was then afforded, whereas the original improvement did not afford adequate drainage. The following statement from the evidence of one of the engineers suggests, at least, an analogous proposition:

"Well, we will assume now, that a ditch is dug, no laterals constructed, assessments for main ditch are spread, some of the outlying lands might be assessed on an equitable basis, ten, twenty, thirty or forty dollars to the forty, and receive all the assessments due according to the benefits. Then take the same district, and construct laterals up through some of the side lines, and they might be benefited ten thousand dollars, to the extent of ten or twelve hundred dollars to the 40, sometimes more, and then their assessment on one forty, instead of fifty, might be ten hundred and fifty dollars. We clean out the ditch. If the lateral had not been assessed, we would prorate it, and his share of the clean out might be twenty dollars or forty per cent, possibly $50, whereas if you include the cost of the lateral in which the cost of the main, and assess on that to raise the cost of repairing, he might pay, say 20% of his ten hundred and fifty dollars, or two or three hundred dollars, whatever it is. He certainly is not benefited more by cleaning out than by the main, and by this you would assess this outlying forty and are doing it in this case, sometimes three or four hundred times the original ditch." (R. 52-53.)

The Iowa Court in *Christenson vs. the Board*, 179 Iowa, 745, 748-9, in discussing a similar situation, said:

"If the commissioners in this case had followed the directions of the statute, and had fixed the amount of benefit accruing to each landowner in the Bear Creek district by reason of the deepening and extending of the outlet, they might have found that the benefits of such

extension were not in the same ratio, as among the landowners, as the original benefits which accrued in the establishment of the district. The facts of this case are quite illustrative of the possibilities of such a situation. About five-sevenths of the original cost of the improvement of Section 1 of the Bear Creek District was assessed against the plaintiff Braland. His lands, however, are farthest removed from the outlet. The original outlet was located upon the land of Mortvedt. This land was low. Mortvedt received damages for the location of such outlet upon his land. His benefits, also, were regarded as comparatively small because of the low elevation and location of his land. The outlet being now extended and deepened by the new enterprise, the commissioners might have found that the benefits of such extension and deepening of the outlet were comparatively greater to Mortvedt than they were to Braland."

In this particular case, it is obvious that such a line as Branch A would but inadequately serve property owners who required an outlet through that Branch as the Branch was originally constructed. But, with the relatively enormous changes which were made under the Hiatt contract in the enlargement of the drain, doubtless the property owners will be well served. The original assessment apportioning the benefits in accordance with the "actual" benefits, must be presumed to have resulted in a low assessment upon the land served by this ditch. But, as a result of the enlargement of the drain, which of course, in this case, was both widened and deepened (but would be the same if it had been deepened only), a property owner who may have had actual benefits of only—say one hundred dollars per forty acres, may easily have benefits of one thousand dollars, or more.

We venture to say, if the point needed proof, that it could be demonstrated in this district, and in every other large district, that it could be found that in the original assessment, the owner of a given forty acre tract has been assessed, upon the theory that adequate drainage would be given him, a large sum, say one thousand dollars. Another owner of a like amount has been assessed only one-tenth of that sum because only an inadequate outlet was given. Suppose thereupon the ratio being thus fixed the Board decides to deepen the inferior outlet, after which both tracts will be served alike. Not only will the second tracts of property and the owner escape paying a relatively equitable proportion of the original tax, but the property which has been assessed for full benefits in the first instance will actually pay ten times as much for enlarging the ditch to give equally adequate service to the other tract.

The property that is finally served when the ditch is enlarged could not have been taxed in the first instance because it was subject only to assessment for actual not theoretical benefits. The apportionment should be according to the benefits actually, and not theoretically derived.

The system for ascertaining the benefits, which fixed the benefits as measured by actual conditions, can no longer be regarded as an equitable apportionment, when, for the original set of actual conditions, there is substituted another set affecting in a wholly different way the several tracts of land in the district.

The Supreme Court of Iowa has repeatedly held that land within a drainage district can be assessed for improvements made therein only for the actual (not theoretical) benefits accruing to the particular tracts of land within the district. *Jenison v. Green County*, 145 Iowa, 215, page 220, 123 N. W. 979; *In re: Johnson Drainage District*, 141 Iowa, 380, 118 N. W. 380; *Rystad v. Drainage District*, 157 Iowa, 85, 137 N. W. 1030; *Theilen v. Board*, 179 Iowa, 248, 160 N. W. 915.

Furthermore the Court has consistently held that in passing on the equality of the assessments the depth of the improvement, as affording an outlet to lands, should be taken into consideration, and where a ditch has been cleaned out or deepened consideration should be given to the adequacy of the original ditch prior to the cleaning out or the deepening as furnishing an outlet for lands in making assessments therefor. *Harriman vs. Board*, 169 Iowa, 324, 151 N. W. 468; *Monson v. Board of Supervisors*, 167 Iowa, 473, 149 N. W. 624; *Theilan v. Board of Supervisors*, 179 Iowa, 248, 160 N. W. 345; *Pollock v. Story County*, 157 Iowa, 232, 138 N. W. 415; *Obe v. Board of Supervisors*, 169 Iowa, 449, 151 N. W. 453.

It will be observed from the record in this case that the assessment which was originally levied against the lands within the drainage district was the result of an apportionment according to the benefits which it was determined would accrue to the several parcels of land in the construction of the original improvements.

The Supreme Court of Iowa furthermore has consistently said that in levying an assessment on the lands within a drainage district the Board should consider the previous outlet and previous means of drainage enjoyed by the lands within the district. *Rystad v. Drainage District*, 157 Iowa, 85, 137 N. W. 1030; *Lyon v. Sac County*, 155 Iowa, 367, 136 N. W. 324; *Obe v. Board*, 169 Iowa, 449, 151 N. W. 453; *Harriman v. Board*, 169 Iowa, 324, 151 N. W. 468; *Bibler v. Board*, 162 Iowa, 1, 142 N. W. 1017; *O'Donnell v. Board*, 169 Iowa, 660, 169 N. W. 660.

It is of course self-evident that a drain cannot be deepened without relatively changing the value and usefulness of the drain in respect of different tracts of land in the area served by the improvement. This is true both of the land lying

along the ditch and directly served thereby, and all tracts of land lying farther back. Throughout the portions of the State in which drainage districts have been constructed, while ample fall is afforded for many of the parcels of land in a district, other have barely enough fall to get the surface waters off. Such are relatively lower lying tracts. A material change in the depth of the channel will make an enormous difference in the benefits to the lower lying tracts. (R. page 52.) *Christenson v. Board*, 179 Iowa, 745, 748-749.

As will be observed by a reading of the Iowa drainage statute, Section 1989-a1 to 1989-a27, inclusive, the thought of the act is throughout that the original assessment shall have relation to "the original design or plan of the ditch as therein established."

This thought is found throughout the Act and has been recognized by the decisions of the Supreme Court of Iowa. It must, therefore, be fundamental that an assessment based upon such original design or plan cannot be regarded as a just and equitable assessment when there is substituted for the original plan or design a different plan or design.

The statute, Section 1989-a12, specifically requires the commissioners appointed by the Board of Supervisors to make an equitable apportionment of the cost, and that in making the estimate that "the lands receiving the greatest benefit shall be marked on a scale of one hundred and those benefited in less degree shall be marked in such percentage of one hundred as the benefit received bears in proportion thereto." That the commissioners on the original assessment for the original construction canot take into account the benefits which might result from a subsequently reconstructed, or enlarged, widened or deepened improvement, is apparent from the statute and from the decisions of the Supreme Court of Iowa. Furthermore, under the mandatory provisions of the law the commissioners in making the assessment can take into account simply and solely the improvement as shown by the approved engineer's plans, and not a different improvement which may be constructed in the future. (*C. & N. W. Ry. Co. v. Board of Supervisors*, 172 N. W. 443 (Iowa); *Kelley v. Drainage Dist.*, 158 Ia. 735, p. 743.)

As appears from the record, (transcript pages 42 and 56), the costs of the new construction of which complaint has been made herein, was assessed against the various tracts of land within the drainage district in the same ratio as the lands were assessed for the construction of the original improvement therein.

There was included in the drainage district, and subject to assessment for the costs of construction, more than two hundred and fifty forty acre tracts. Hence, the drainage area served by the improvement contained more than ten thousand acres. (R. pp. 74-80.)

The improvement constructed to serve this drainage district consisted of three principal lines of open drain. In parts of the district there were certain lateral lines of tile or closed drains. The closed drains cost much more to construct but are more permanent in their character, requiring little or no expense for cleaning or repairing. Lands having such closed drains crossing the same bear a much greater burden of assessments than lands served only by open drains.

The main open ditch serving this district was about twelve miles long; two branches of open drain connected therewith, and had their outlet in the lower part of the main ditch. (R. p. 61.) Branch "A" was the designation of one of the open branches, the other was Branch "B". (R. 41; R. 47.) These branches served widely separated tracts of land and except that the branches had a common outlet, the tracts of land contiguous to the respective branches had nothing in common. Bodies of land varying in area from several hundred acres to several thousand acres, were served respectively by the main line of ditches known as the "main" or by "Branch A or Branch B". The gradient of the several lines of open ditch varied much as did also the natural contour of the surface of the areas which were served.

When the original assessment was spread upon the lands in the district the benefits were calculated in accordance with the drainage afforded by the improvement as originally planned and constructed. And the total cost of the entire improvement, including the three lines of open drain, was apportioned over the whole district without subdivision into units served by the respective lines of drain. (R. pp. 52-53.)

The contract for the "enlargement", "repairing" and "deepening" which was the basis for the assessment in controversy here, provided for additional excavation work in the "main" ditch and in branch "A" (R. 69), so that lands served alone by branch "B" could not receive any actual benefits. At least it will be considered that for the work done on branch "A" this must be true. The respective engineers testifying for the plaintiffs in error, and for the defendant, agreed that the result of widening and deepening certain lines of drain in a system of this kind thus bettering the improvement serving only a part of the district and spreading the assessment in accordance with the original assessment, was unfair to the property owner whose property was not served by the reconstructed drains. (See R. 52-53; pp. 72-73.) The engineer for the defendants referring to the original assessment and apportionment in accordance with which the present assessment was spread (R. p. 72) said:

> "In this particular case the final assessment was made by what was called the Skeels commission. The Skeels commission lumped the costs and damages for the entire

district in one lump sum and spread it over the entire ditch as one unit, without reference to and served by various laterals. I recall from my investigation that the cost of Branch B itself is a considerable sum in proportion to the area served by it.

Q. Now, if the property owners in that area had been assessed a sum in proportion to the rest of the district as one lump sum and are assessed now in accordance with the original assessment in proportion to that for the cost and cleanout, they may get excessive assessments, in proportion to the benefits from the cleanout itself, and so may the property owners in every special drainage area served by an expensive tile. Is that correct?

A. If they had originally paid in proportion to the cost of their tile line and now paid on a basis of the original assessment, which was practical for a tile line, they would of course pay for the cleanout in proportion to the cost of their tile line, and the main together. And if their tile line were more expensive, would make the cleanout tax heavier."

These plaintiffs paid large assessments originally, due to the considerable benefits attributed in the original assessment to the lines of tile crossing their farms. The result as testified to by one of the engineers, was that for the cost of deepening a remote line of open drain which in no way served their property, they were now being assessed as much as three or four hundred times what owners of other remote tracts were being assessed. (R. pp. 52-53.) This was due to the fact that the forty acre tracts served by the tile drains originally constructed, were assessed upon the basis of the direct benefits resulting from such permanent drains, and lands served by open drains such as the property contiguous to Branch A was assessed a relatively insignificant sum for such forty acre tract. Now, that branch A is enlarged and deepened to give adequate drainage to the land contiguous thereto, the cost of deepening and widening the drain in order to give such adequate service is made to rest, not upon the contiguous and benefited lands, although if the assessment was an original one this would be true. Notwithstanding the fact that the total cost of such improved drain inured to the exclusive benefit of the lands contiguous thereto, almost the whole burden of producing such benefits is by reason of this inequitable law thrown upon the land not benefited at all.

When, therefore, the Board of Supervisors ordered a levy to be "spread on the tax lists" in the same ratio as the original assessments "were made and confirmed" (R. 42), *the effect was to order the assessment to be spread in the inverse ratio to the benefits.* The benefits accruing from the deepened

and enlarged drains that now took the place of the shallow and inadequate drains necessarily were proportionately greater in respect of the lands contiguous to the improved drain than land remote therefrom. And of course, remote lands served entirely by other lines of drain were really not benefited at all as a result of the deepening and enlarging of such originally inadequate drains. Thus, assessments which originally were only nominal because of the inadequacy of the drains serving the tracts contiguous thereto, continued only nominal in amount, although adequate drainage was now afforded for such tracts of land. And assessments which originally were very large because of the benefits, accruing from lines of drainage in no manner enlarged or repaired or bettered, continued large in amount although the taxes were levied solely to pay the costs of the drainage of lands remote from the lands thus bearing the greater burden of the costs.

The lands of the property owners who are here concerned as plaintiffs in error were served by Branch B. (R. 31-34; R. 45.)

In apportioning the original assessment the taxing authorities, acting under the Iowa statute, took into account, the extent to which a land owner has drained his lands, the character and location of the lands, and their elevation as compared with other lands in the drainage area; the adequacy of the outlet afforded by the improvement involving the relative elevations of the surface of the land and the bottom of the ditch, together with the distance of the tract to be drained, from the improvement, and the amount of fall required for efficient drainage. Therefore, if an improvement as originally planned and constructed affords only inadequate drainage for contiguous lands, the assessment of benefits is necessarily so apportioned that only small or nominal amounts are originally thus assessed against the tracts not adequately served. And when the drain is enlarged or deepened in order to give adequate drainage for contiguous tracts which before were inadequately served, it must necessarily follow that the original ratio of assessment based upon a status that no longer exists can no longer govern if equity is to prevail.

Under Section 1989-a12 it is the imperative duty of the assessing authorities to spread the original assessment in accordance with the benefits directly accruing from the construction of the improvement as originally planned. It was the duty of the authorities in this case to apportion the cost of the original construction so as to burden lightly the lands served by Branch A as originally constructed. Hence, when branch A was deepened and widened and the cost thereof spread in accordance with the benefit from the original construction the result was to impose upon the property owner served by distant lines of drain suchas the property owners in the area served by branch B, in addition to the full assess-

ments for the cost of their own drains, the greater part of the cost of reconstructing branch A from which their lands derive no benefits.

Section 1989-a21 as construed and enforced by the Iowa Supreme Court denying the right to notice and hearing in respect of the apportionment of the cost of the reconstructed improvement, is in direct violation of the safeguards provided in the Federal constitution.

The facts in this case are not unusual and well illustrate the vice in the statute as construed and enforced by the Supreme Court of Iowa. Here are two or more parallel lines of drain extending from a common outlet miles through extensive areas of agricultural lands. These several substantially parallel lines are constructed as a single "improvement" and assessments are spread for the total cost of all the lines as originally constructed in proportion to the benefits accruing to the several forty acre tracts of land in the drainage area. As originally planned, certain areas of lands are so low in elevation with respect to the bottom of the particular drains affording an outlet for the surface drainage therefrom, that a relatively small assessment is necessarily imposed under the statute for the benefits to such tracts. Some years thereafter, it is decided to repair and enlarge by deepening and widening the inadequate drain, and as a result thereof sufficient and adequate drainage is afforded for the tracts of land originally assessed only small or nominal amounts. Under Section 1989-a21, without notice or any opportunity for hearing, an assessment is spread upon tracts of land many miles distant from the enlarged drain for the cost of enlarging it, and which lands are benefited not at all by such enlargement. Because the original scheme of drainage afforded an adequate outlet for these distant lands (and in this case because expensive lines of tile were originally placed across such land and the cost charged to the lands) the original assessment thereon was many times as great as the assessment against the tracts contiguous to the originally inadequate drain. Hence, the reassessment, without notice or hearing, results in compelling such land originally adequately drained to pay practically all of the costs of the original adequate drain and later on, practically all of the cost of affording adequate drainage to the lands which were not originally well drained.

The statute in question compels an inequitable assessment to be made without notice or hearing in every case where the enlarged or bettered improvement is so enlarged or bettered as not to benefit in the same proportion all tracts of land subject to assessment in the district. It is perfectly obvious that enlargment by deepening, widening or otherwise, of certain lines of drains in an extensive improvement district without adding anything whatsoever to other such lines of drains, must inevitably lead to gross inequalities in the assessment

of the costs of reconstruction. If the new assessment must be spread in the same ratio as original assessments and no opportunity afforded to show that although the original assessment was equitable the cost of enlarging certain of the branches cannot be equitably spread in accordance therewith, the necessary effect of so enforcing the statute is to impose the burden upon the tracts of land originally assessed for the first improvement without any compensating advantage. This is a clear violation of the due process clause of the Federal constitution.

This Court has held repeatedly that imposing a burden without a compensating advantage, is not due process of law. *Myles Salt Company v. Board of Commissioners*, 239 U. S. 478, 60 L. ed. 392, was a case in which a tax was levied by the commissioners of a drainage district upon the plaintiff's lands. It was there shown that the plaintiff's lands were so situated that they could not directly or indirectly receive any benefit, other than such benefit as might accrue to it incidentally by the benefit which accrued to other lands within the drainage district. It was claimed that the tax so levied was without due process of law and this claim was sustained by this Court. In the course of its opinion this Court said:

> "It is to be remembered that a drainage district has a special purpose of the improvement of particular property, and when it is so formed to include property which is not and cannot be benefited directly or indirecly including it, only that it may pay for the benefit of other property, there is an abuse of power and an act of confiscation."

In *Gast Realty & I. Company v. Schneider Granite Company*, 240 U. S. 55, 60 L. ed. 523, a special assessment was levied which was not at all based upon the benefits covered, and this Court held that it violated the due process clause of the federal constitution, and on the writ of error reversed the State Court. In that case this Court said:

> "But as is implied by *Houck v. Little River Drainage District*, if the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of the one so taxed in fact. *Martin v. District of Columbia*, 205 U. S. 135, 139, 51 L. ed. 743, 744, 27 Sup. Ct. Rep. 440."

In *Fallbrook Irrigation District v. Bradley*, 104 U. S. 112, 41 L. ed. 369 at page 394, this Court said:

"The right which he (the landowner) thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, i. e. the amount of the tax which he is to pay. *Paulson v. Portland*, 149 U. S. 30, page 41, 37 L. ed. 641. But when as in this case the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited, and the decision of that question is submitted to some tribunal (Board of Supervisors in this case), the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the Board be against their being benefited. Unless the legislature decides the question of benefits itself, the landowner has a right to be heard upon that question before his property can be taken. This, in substance was determined by the decision of this Court." *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, and *Spencer v. Merchant*, 125 U. S. 345, 356, 31 L. ed. 763, 767."

In *Norwood vs. Baker*, 172 U. S. 269, 43 L. ed. 443, this Court said:

"In our judgment the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him, is to the extent of such excess a taking under the guise of taxation of private property for public use without compensation."

Furthermore in the course of that opinion this Court said:

"While abutting property may be specially assessed on account of the expense attending the opening of a public street in front of it, such assessment must be measured or limited by the special benefits accruing to it, that is, by benefits that are not shared by the general public; and that taxation of the abutting property furnished, substantial excess of such exercise of special benefits will, to the extent of such excess, be a taking of private property for public use without compensation. * * * The judgment of the Circuit Court must be affirmed upon the ground that the assessment against plaintiff's abutting property was under a rule, which excluded any inquiry as to special benefits, and the necessary operation of which, was, to the extent of the excess of costs of opening the street in question of any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation."

The Supreme Court of Iowa in the instant case, says:

> "But by the other section, 1989-a21, provision is made for the maintenance and care of the drainage system after the 'district shall have been established and the improvement constructed.' For that purpose it is there provided that the improvement 'shall at all times be under the control and supervision of the board of supervisors and it shall be the duty of the board to keep the same in repair' and for that purpose 'they may cause the same to be enlarged, reopened, deepened, widened, straightened, or lengthened for a better outlet.' The cost of such repairs and changes are to be paid from the drainage fund of the district or by assessing it upon the lands in the same proportion that the cost of the original construction was assessed—except where additional right of way is taken and in such case the board must proceed as the statute provides for establishing an original improvement."

It is apparent from the opinion of the Supreme Court of Iowa that in its judgment the requirements of due process are fulfilled without any reference to the making of the assessment provided no new right of way is taken. In other words, it appears to be the Court's view that if it were essential to condemn an entirely new right of way, that then it would be necessary that there be notice and hearing to the landowner whose lands were required to be taken for the new right of way, and even here, the Court evidently so holds simply because the statute expressly requires notice and hearing. The Court, however, seems to be of the opinion that a widening and deepening of a ditch which is in itself, of course, a taking of additional right of way, does not require notice or hearing to the landowner; and further it takes the position that the constitutional requirements of due process do not apply in levying a tax for the expense of deepening and widening even though no benefits accrue to the landowner whose lands are assessed therefor. We submit that the constitutional requirements have as much application to notice and hearing in levying special assessments as they have to notice before exercising the power of eminent domain.

There seems to be no dispute among the authorities with the exception of the holding by the Iowa Supreme Court in the instant case, that in order to come within the provisions of a statute authorizing and controlling the repair of ditches, and taxation of benefited property in payment therefor without notice and hearing, the proceedings must be limited to a mere restoration of the ditch to the condition in which the original construction proceedings left it. Repair proceedings cannot be employed to complete work which has been left in-

complete, nor to enlarge work which was inadequate as originally constructed.

The Minnesota Court (reference to which has been hitherto made in the argument) holds that by enlargement of a ditch already constructed, whether by widening or deepening it, does for all practical purposes constitute a new ditch. (*In re Renville County*, 122 N. W. 1120, 1121.) The same Court in 130 N. W. 1103, being a second appeal of the case just mentioned, held that a deepening of one foot for a part of the ditch's length beyond the original depth, was a material deepening so as to require notice and hearing of assessments to be levied for its costs.

It is to be remembered that there is a vital distinction between repairing a ditch by removing obstructions therefrom, and widening, deepening or extending it. *In re Renville County*, 122 N. W. 1120, 1121 (Minn.); *Harbough v. Martin*, 30 Mich. 234; *Lanning v. Palmer*, 117 Mich. 529, 76 N. W. 2; *Taylor v. Crawford*, 72 Ohio St. 560, 74 N. E. 1065; 69 L. R. A. 805; *Fries v. Brier*, 111 Ind. 65, 11 N. E. 958; *Romack v. Hobbs*, (Ind.) 32 N. E. 307; *Weaver v. Templin*, 113 Ind. 298, 14 N. E. 600; *People ex rel. Munsterman v. McDougal*, 205 Ill. 636, 69 N. E. 95; *Denyer v. Shonert*, 1 Ohio C. C. 73; *Taylor v. Brown*, 127 Ind. 293, 26 N. E. 822.

The Illinois Court in *People v. Munsterman*, 69 Northeastern 95, 96-7, said:

> "At the regular meeting, November 1, 1902, the commissioners made a levy of $25,000 for the purpose of deepening and cleaning out the ditches of this district. 'It is thus apparent that the commissioners, in making this levy, attached to the terms "cleaning" and "repairing" a much wider significance than can be given the term "repair" under section 70 above cited, and it is also apparent that the commissioners were without authority to make this levy, under that section, for the purpose for which it was made, except such portion of the levy, if any, as was necessary' to keep the work, or any part thereof, in repair for the year next ensuing.
>
> "Appellant cites the case of *Ottawa Glass Company v. McCaleg*, 81 Ill. 556, in support of the proposition that 'the commissioners, acting within the scope of their authority are the judges as to whether or not the tax in question is a repair tax, and their judgment in the matter is not subject to review.' If this statement of the law were correct it would relieve the courts of the burden of determining whether the tax was a valid one. We find on examination, however, that the authority cited does not warrant the conclusion which counsel for appellant have drawn therefrom.

"The statement of the drainage commissioners in their certificates that the tax levied is a tax for repairs is not conclusive, and where it is shown that it is not a tax for that purpose it cannot be sustained as a repair tax under said section 70."

A levy cannot be made on a subdistrict for the purpose of cleaning out or improving branches of the main district constructed by the whole district. See *People v. Wilder*, 100 N. E. 932. If this is true, is not the converse not true that an assessment cannot be made upon the property owners in one subdistrict to pay for the expense of enlarging the main ditch which is of no benefit to the property owners in the subdistrict?

One of the latest pronouncements on the questions at issue in this case is that of the Supreme Court of Indiana in *Harmon v. Bolley*, (Ind.) 120 N. E. 33. The matter is discussed in an exceedingly able opinion by Justice Lairy of that Court. We quote from the opinion:

"Appellees filed their petition in the Miami circuit court asking for the cleaning and repair of a public ditch located in the counties of Miami and Wabash and known as the 'Squirrel Creek Ditch'. The proceeding was had under a statute of this state specially providing for proceedings for the repair of public ditches constructed by means of a steam shovel or floating dredge. * * * The petition was by the court referred to the county surveyor of Miami county, with directions to make an examination of the ditch proposed to be cleaned, and to report to the court as provided by the first section cited. The surveyor filed a written report in favor of the proposed cleanout, with complete specifications for repairs, whereupon notice by publication for two weeks was given by the clerk of the court. * * * On the return day fixed in the notice appellants appeared and filed verified objections to the jurisdiction of the court on the ground that the statute hereinbefore cited, which purports to confer jurisdiction on the court to order the repair of ditches in the manner therein provided, is void for the reason that its provisions with reference to the manner in which assessments are to be made conflict with certain provisions of the state and federal Constitutions. * * * The statute under consideration provides for a hearing on the report after notice, on which the court shall determine whether such ditch shall be repaired, and, in case the finding is in favor of such report the courts shall determine the order and manner in which said ditch shall be cleaned; and after such order has been made the clerk shall let the contract, after giving the notice provided, to the lowest

responsible bidder, which contract shall be approved by the Court. The costs of such repairs, including the per-diem of the county surveyor and printer's fees for the publication of all necessary notices, shall be paid by the persons, corporations, corporate roads, and railroads who are the owners of lands or rights of way originally assessed for the cost of construction of said ditch, in proportion to their original assessments as levied and made for the construction of said ditch. * * * It is made the duty of the clerk of the court in which such proceedings is had to make a computation of the several assessments to be made and levied for such repair work by distributing the total cost of construction and the other expenses incidental thereto as in this act provided, and to prepare a report of the same, giving the name of the landowner assessed as the same appears on the tax duplicate, a description of his lands, and the amount to be apportioned to said lands, whereupon such report shall be submitted to the court for approval. If the Court finds the report to be correct, it shall approve the assessments as made and fix the time within which the same shall be paid. Under the provisions of the act, all assessments paid to the clerk within the time fixed by the court shall be turned over to the county treasurer for the purpose for which the same were intended, and it is made the further duty of the clerk to certify all assessments not paid within such time to the county auditor, to be placed on the tax duplicate, and collected with a penalty of 10 per cent, as other taxes are collected. * * * Appellants' position is that the provisions of the act with reference to the allotment of the costs and expenses of the repairs is in conflict with the provisions of the Fourteenth Amendment to the federal constitution. * * * It is the theory of appellants that the statute under which the proceedings were had provides for the apportionment and assessment of the costs and expenses of the repair to the several tracts and parcels of land affected in an arbitrary manner, without regard to the real or actual benefits which will accrue to each parcel of land by virtue of the proposed improvement, and that no provision is made by the statute whereby appellants are entitled to a notice or hearing by which the actual benefits to their lands may be determined by any tribunal. If the statute is followed, it is apparent that an assessment will be placed against the lands of appellants which will bear the same ratio to the total costs and expenses of the proposed repairs as the original assessments against said lands bore to the total assessments made for the construction of the ditch originally, and that no provision is made whereby they can challenge the amount of the assessment so made as being in excess of

the actual benefits accruing to their lands on account of such repair. * * * Such rules of apportionment are always fixed according to some ratio, and, where no provision is made for a judicial inquiry as to actual benefits, they are invariable and unchangeable. If the result to be reached is the fixing of assessments in accordance with actual benefits, and if such rules are well adapted to reach that end, they afford due process of law and should be universally upheld. * * * On the other hand, if such rules are not well adapted to reach that end; if their application, at best, results in assessments which are to some degree disproportioned to actual benefits, and some times work a gross injustice; if a judicial determination, after notice and the hearing of evidence, is more likely to result in fixing assessments in accordance with actual benefits; if that course is better adapted to protect the rights of the citizen and is more suitable to the administration of justice according to the forms of law usually recognized and adopted in the settlement of such questions—then due process of law requires that a judicial determination after notice and hearing should be provided for. *Hager v. Reclamation Dist., supra; Davidson v. New Orleans,* 96 U. S. 97, 24 L. ed. 616. * * * The law under consideration provides that the entire costs of the repairs of ditches to which it applies shall be imposed on the lands assessed for its construction. Under this rule lands which were not assessed for the original construction of the ditch, but which find outlet through it by means of connecting drains subsequently constructed, could not be assessed to pay any part of the cost of repair, although they might be largely benefited thereby. It appears from the objections filed that a large part of the fill which makes the repairs necessary is located on certain lands through which the ditch runs, and that such fill was caused by the stock of the owners of those lands in tramping the adjacent soil into the ditch and thus destroying the banks. It is stated that the removal of the fill thus caused will constitute a large part of the cost of the proposed repair. Some of the objectors state that the drainage from their lands finds an outlet into the ditch at a point below the portion so filled, and that the fill to be removed was not caused by sediment washed in by their drainage, and that its removal will not afford them any better outlet for their drainage than they now have. Under the rule of apportionment adopted by the law, these facts could not be considered in fixing the assessments. * * * The objectors allege that in making the assessments for the construction of the ditch the viewers, in obedience to the statute, made deductions from the estimated benefits to numerous tracts of land affected on ac-

count of existing private drains which were utilized, and that the assessment against lands, as shown by the record of that proceeding, represents the actual benefits less such deductions. It thus appears that the original assessments against such tracts of land were not in accordance with the actual benefits received from the construction of the ditch, and that an apportionment of the cost of repairing such ditch to the several tracts of land originally assessed in proportion to such original assessment would not result in fair and just assessments in accordance with the benefits. Such rule of apportionment is unreasonable and unjust as applied to the facts shown, but the law is not void for that reason. It is void because it does not afford due process of law for the protection of the rights of the landowner by providing for a notice and hearing on the question of actual benefits, whereby the assessments could be adjusted to accord with actual benefits accruing to each tract of land affected. For the reasons stated, any assessment levied under the provisions of the statute under consideration would be void, and the enforced payment of any money on account of such assessments would constitute a deprivation of the property of a citizen by the state without due process of law, within the meaning of the Fourteenth Amendment of the federal Constitution."

In the foregoing case, as appears from the decisions, the statutes of Indiana provides that for repairs had the landowners within the district are to be assessed for the cost of repairs "in proportion to their original assessment as levied and made for the construction of said ditch." This language is identical in substance with the language of Iowa Code Section 1989-a21. The Indiana Court holds that such an assessment is not due process. Furthermore, the statutes of Indiana provide that where it is sought to clean out or repair an established ditch, that notice for publication shall be given for two weeks that a hearing will be had thereon; and in the foregoing case the landowners appeared on the written date fixed in the notice and filed their objections. The Iowa statute as construed by the Supreme Court of Iowa does not even afford a hearing to the interested landowner as to whether or not repairs should be had.

In the instant case, we have called attention to the fact that the undisputed facts in this case show that there was a material deepening, widening and lengthening of the old ditch as originally constructed. The Supreme Court of Iowa, does, by its opinion, find that there was a material deepening; and further finds that there was a widening, and both affirms and denies in its opinion that there was an extension. We take it to be the well established rule of this Court that it will

review the facts. This Court has held in numerous cases that where the question arises as to whether the basis of fact upon which the State Court rested its decision denying the asserted federal rights has any support in the evidence, that it is this Court's duty to review and correct where there is error. *Postal Tel. Cable Co. v. Newport*, 247 U. S. 464, 62 L. ed. 1215, 38 Sup. Ct. Rep. 566; *Southern P. Co. v. Schuyler*, 227 U. S. 601, 611, 57 L. ed. 662, 669, 33 Sup. Ct. Rep. 277; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 259, 58 L. ed. 591, 595, 34 Sup. Ct. Rep. 305; *Carlson v. Washington*, 234 U. S. 103, 106, 58 L. ed. 1237, 1238, 34 Sup. Ct. Rep. 717; *Norfolk & W. R. Co. v. West Virginia*, 236 U. S. 605, 610, 59 L. ed. 745, 748, 35 Sup. Ct. Rep. 437; *Interstate Amusement Co. v. Albert*, 239 U. S. 560, 567, 60 L. ed. 439, 443, 36 Sup. Ct. Rep. 168; *Ward v. Love County*, 64 L. ed. U. S. Advance Opinions, 492 issue of June 1, 1920.

If this were not true and if non-federal grounds, plainly untenable, might be put forth by a State Court successfully, then this Court's power to review might easily be avoided. *Ward v. Love County, supra; Terre Haute & I. R. Co. v. Indiana*, 194 U. S. 579, 589, 48 L. ed. 1124, 1129, 24 Sup. Ct. Rep. 767.

As this Court put the matter specifically in *Carlson v. Washington, supra:*

> "A state Court cannot, by omitting to pass upon the basic questions of fact, deprive a litigant of the benefit of a federal right, any more than it could do so by making findings that were wholly without support in the evidence. And this Court, where its appellate jurisdiction is properly invoked and all the evidence is brought before it, will, if necessary for a decision of a federal question, examine the entire record in order to determine whether there is evidence to support the findings of the state court, so it is also its duty in the absence of adequate findings to examine the evidence in order to determine what facts might reasonably be found there from, and which would furnish a basis for the asserted federal right."

In the instant case the Supreme Court of Iowa expressly holds that the statute (1989-a21) gives the Board of Supervisors of a County the authority to enlarge, reopen, deepen, widen and straighten ditches within a drainage district, and to assess the cost thereof upon the lands therein without notice, and without an opportunity for hearing by the interested landowners, and notwithstanding this holding the Supreme Court of Iowa held that it did not violate the due process clause of the Fourteenth Amendment to the Constitution of the United States. That it does violate this clause seems clear under the authorities. (See authorities under brief points 3, 4 and 5.)

The position taken by the Supreme Court of Iowa in the instant case may be seen from the following quotation:

> "The contract between the Board and Hiatt to which the plaintiffs object, appears to be fairly and clearly within the scope of the power and responsibility conferred by this section. Even if the terms of the contract be as broad and comprehensive as plaintiffs say they are, they are still not in excess of the authority expressly given to 'enlarge, reopen, deepen, widen and straighten' the completed ditches for the purpose of keeping them in repair and maintaining them in efficient working order. The statute imposes no duty to give notice in advance of each separate work of repair, or to advertise the same for competitive bids—except, perhaps, as may be implied in the proviso at the end of the section which seems to recognize such necessity where additional right of way is to be taken and this reservation is sufficient, in our judgment, to obviate any possible objection on constitutional grounds."

In view of the foregoing statement by the Supreme Court of Iowa, it appears to us that this Court must necessarily hold that Section 1989-a21 of the Statute of Iowa, does not afford due process and is therefore void, inasmuch as the constitutional validity of a statute is to be tested, not by what has been done under it, but by what may by its authority be done. (*Stuart vs. Palmer*, 74 N. Y. 183, 188.)

In the quotation from the opinion of the Supreme Court of Iowa, to which we have just referred and set out above, that the Court plants itself squarely on the proposition that inasmuch as the legislature has authorized, that a previously constructed drain in a drainage district may be enlarged, reopened, deepened, widened and straightened, that full effect must be given to such legislation; otherwise that the Court will "judicially neutralize the plainly expressed will of the legislature."

And it further holds that as thus construed by it, the act in question does not deny due process of law.

Surely the position thus taken by the Supreme Court of Iowa cannot be upheld by this Court.

We respectfully ask that the judgment of the Supreme Court of Iowa may be reversed.

Respectfully submitted,

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No. 8[redacted]186

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MARCH TERM, 1921.

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VS.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA, ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

(27,342)

BRIEF FOR THE DEFENDANTS IN ERROR.

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ARGUMENT.

Two points are involved in this controversy:

(a) One of Fact.

(b) One of Law.

(a) Fact Question.

Many years prior to the institution of this suit in the State Court, the Board of Supervisors of Pocahontas County, Iowa, in strict compliance with the requirements of the Iowa Statute established and constructed a drainage ditch. After the lapse of years the ditch became inefficient and required repairs. It is the contention of the plaintiffs in error that the Board of supervisors constructed a new improvement rather than repair the old improvement. This question has twice been passed upon by the Iowa Courts, the District or Trial Court holding contrary to the contention of the plaintiffs in error. The Supreme Court of Iowa specifically held and determined this fact question contrary to the contention of the plaintiffs in error. This fact question is determinative of the rights of the plaintiffs in error at this time.

We set forth the material sections of the Iowa Statute bearing upon this controversy. They are as follows:

> Chapter 2-A.
>
> Of Levees, Ditches, Drains and Watercourses.
>
> Section 1989-a1. Board of supervisors to establish drainage district. The board of supervisors of any county shall have jurisdiction, power and authority at any regular special or adjourned session, to establish a drainage district or districts, and to locate and establish levees, and cause to be constructed as hereinafter provided, any levee, ditch, drain or watercourse, or to straighten, widen, deepen or change any natural watercourse, in such county, whenever the same will be of public utility

or conducive to the public health, convenience or welfare, and the drainage of surface waters from agricultural lands shall be considered a public benefit and conducive to the public health, convenience, utility and welfare.

Sec. 1989-a2. Proceedings—bond—survey. Whenever a petition signed by one or more of the landowners whose lands will be affected by, or assessed for the expenses of, the proposed improvement, shall be filed in the office of the county auditor setting forth that any body or district of land in the county, described by metes and bounds, or otherwise, so as to convey an intelligible description of such lands, is subject to overflow or too wet for cultivation, and that the public benefit or utility, or the public health, convenience or welfare will be promoted by draining, ditching, tiling or leveeing the same, or by changing a natural watercourse, and setting forth therein the starting point, route and terminus and lateral branches, if necessary, of the proposed improvement, and there is filed therewith a bond, in amount and with sureties to be approved by the county auditor and conditioned for the payment of all costs and expenses incurred in the proceedings in case the supervisors do not grant the prayer of said petition, the board shall at its first session thereafter, regular, special or adjourned, appoint a disinterested and competent engineer, who shall give bond to the country for the use and benefit of the proposed levee or drainage district, if it be established, in amount and with sureties to be approved by the county auditor and conditioned for the faithful and competent performance of his work; and place a copy of the petition and any other lands which would be benefited by said improvement or necessary in the carrying out of said improvement, and survey and locate such drains, ditch or ditches, improvement or improvements, as may be practicable and feasible to carry

out the purposes of the petition and which will be of public benefit or utility or conducive to public health, convenience or welfare. He shall made return of his proceedings to the county auditor, which returns shall set forth the starting point, the route, the terminus or termini of the said ditch or ditches, drain or drains, or other improvements, together with a plat and profile showing the ditches, drains or other improvements, and the course and length of the drain or drains through each tract of land, together with the number of acres appropriated from said tract for construction of said improvement, and the elevation of all lakes, ponds and deep depressions in said district, and the boundary of the proposed district, so as to include therein all lands that will be benefited by the proposed improvements, and the description of each tract of land therein and names of the owners thereof as shown by the transfer books in the auditor's office, together with the probable cost, and such other facts and recommendations as he may deem material. The board of supervisors may at any time recall the appointment of any engineer made under the provisions of this act, if deemed advisable to do so, and select another to act in his place. That the ditches or drains herein provided for shall so far as practicable be surveyed and located along the general course of the natural streams and watercourses or in the general course of natural drainage of the lands of said district, but where it will be more economical or practicable such ditch or drain need not follow the course of such natural streams, watercourses, or course of natural drainage, but may straighten, shorten or change the course of any natural stream, watercourse or general course of drainage. Whenever any ditch or drain crosses any railroad right of way it shall when practicable be located at the place of the natural waterway across such right of way unless said railroad com-

pany shall have provided another place in the construction of the roadbed for the flow of the water; and if located at the place provided by the railroad company, such company shall be estopped from afterwards objecting to such location on the ground that it is not at the place of the natural waterway.

Sec. 1989-a3. Notice of hearing—approval of plan— * * * fees and mileage for serving notice. That the law as it appears in section nineteen hundred eighty-nine a three of the supplement to the Code, 1907, be repealed and the following substituted in lieu therefor:

"Upon the filing of the return of the engineer, if the same recommends the establishment of the levee or drainage district, the board of supervisors shall then examine the return of the engineer, and if the plan seems to be expedient and meets with the approval of the board of supervisors, they shall direct the auditor to cause a notice to be given, as hereinafter provided; but if it does not appear to be expedient and is not approved, the board of supervisors are hereby authorized to direct said engineer, or another engineer selected by them, to report another plan. At any time prior to the establishment of the district, the plan may be amended, and as amended shall be conclusive, unless appealed from as provided in section nineteen hundred eighty-nine a six of this chapter. When the plan, if any, shall have been finally adopted by the board of supervisors, they shall order the auditor immediately thereafter to cause notice to be given to the owner of each tract of land or lot within the proposed levee or drainage district, as shown by the transfer books of the auditor's office, including railway companies having right of way in the proposed district, and to each lien holder or incumbrancer of any land through which or abutting upon which the proposed improvement extends as shown by the county records, and also to all other persons whom it may

concern, including actual occupants of the land in the proposed district (without naming individuals), of the pendency and prayer of said petition, the favorable report thereon by the engineer and that such report may be amended before final action, the day set for hearing on said petition and report before the board of supervisors, and that all claims for damages must be filed in the auditor's office not less that five days before the day set for hearing upon the petition, which notice shall be served, except as otherwise hereinafter provided, by publication thereof once each week for two consecutive weeks in some newspaper of general circulation published in the county, the last of which publications shall be not less than twenty days prior to the day set for hearing upon the petition, proof of such service to be made by affidavit of the publisher and filed with the county auditor; provided further, however, that when any resident, non-resident, corporation, railroad company, or other persons owning or having an interest in any land or property affected by the proposed improvement shall have filed with the county auditor of the county wherein such improvement is proposed, an instrument in writing, duly signed, and designating the name and post office address of his or its agent upon whom service of notice in said matter shall be made, the county auditor shall, at least twenty days prior to the date set for hearing upon said petition, mail a true copy of said notice in a registered letter addressed to the person or agent so designated in said written instrument, as aforesaid. Proof of such service of said notice shall be made by affidavit of said county auditor and filed by him in said matter in his said office on or before the date of the hearing upon the petition, and such service shall be in lieu of all other service of notice to such residents, non-residents, corporations, railroad companies or other persons. No notice need be served

by the auditor upon any of the persons hereinbefore described who shall file with said auditor a statement in writing signed by him entering his appearance at said hearing and waiving any additional notice. If, at the date set for the hearing before the board of supervisors, it should appear that any person entitled to notice, as provided in this section, has not been served with notice for the time, or in the manner, as herein provided, the board may postpone said hearing and set another time for the same, and notice of such day of hearing may be served on such omitted parties in the manner and for the same length of time as provided for in this section; and by fixing such new day for hearing and by adjourning said proceedings to said time, the board of supervisors shall not be held to have lost jurisdiction of the subject matter of said proceeding, nor of any parties so previously served with notice. Personal service upon any of the parties above described in the manner and for the time required for service of original notices shall be sufficient and make publication of notice as to such persons unnecessary."

Sec. 1989-a4. *Claims for damages.* Any person claiming damages as compensation for or on account of the construction of such improvement shall file such claim in the office of the county auditor at least five days prior to the day on which the petition has been set for hearing, and on failure to file such claim at the time specified, shall be held to have waived his rights thereto; provided, however, that it shall not be necessary to file claims covering value of land appropriated for right of way for construction of proposed improvements.

Sec. 1989-a5. *Location—Appraisers.* The board of supervisors at the session set for the hearing on said petition, which session may be regular, special or adjourned, shall thereupon proceed to hear and determine the sufficiency of the petition in form and substance, which petition may be amend-

ed as to form and substance at any time before final action thereon, and, if deemed necessary, the board may view the premises and if they shall find that such levee or drainage districts would not be for the public benefit or utility, nor conducive to the public health, convenience or welfare, they shall dismiss the proceedings; but if they shall find such improvement conducive to the public health, convenience or welfare or to the public benefit or utility and no claim shall have been filed for damages as provided in section four hereof, they may, if deemed advisable, locate and establish the same in accordance with the recommendations of the engineer, or they may refuse to establish the same as they may deem best; and at said hearing, the board may order the said engineer or a new engineer appointed by them if deemed advisable to make further examination and report to said board as to said proposed improvement, and if they determine that further examination and report shall be made, or if any claims have been filed for damages, as provided in section four hereof, then the board of supervisors shall proceed no further than to determine the necessity of the levee or drainage districts and further proceedings shall be continued to an adjourned, regular or special session, the date of which shall be fixed at the time of the adjournment; and the county auditor shall appoint three appraisers to assess such damages, one of whom shall be the engineer theretofore appointed as above provided, or, in case of his absence or inability to act, some other engineer, and two freeholders of the county who shall not be interested in, nor related to any party interested in the proposed improvement.

Sec. 1989-a6. *Assessment of Damages—Appeal.* The appraisers appointed to assess damages shall proceed to view the premises and determine and fix the amount of damages to which each claimant is entitled, and shall place a valuation upon all

acreage taken for right of way as shown by plat of engineer and shall, at least five days before the date fixed by the board to hear and determine the same, file with the county auditor reports in writing showing the amount of damages sustained by each claimant. Should the report not be filed in time or should any good cause for delay exist the board may postpone the time of final action on the subject and, if necessary, the auditor may appoint other appraisers. When the time for final action shall have arrived, and after the filing of the report of the appraisers, said board shall consider the amount of damages awarded in their final determination in regard to establishing such levee or drainage district, and if in their opinion the cost of construction and the amount of damages awarded is not excessive and a greater burden than should be properly borne by the land benefited by the improvement, they shall locate and establish the same, and they shall thereupon appoint said engineer, or if deemed advisable, may appoint a n engineer as a commissioner, who shall make a permanent survey of said ditch as so located, showing the levels and elevations of each forty-acre tract of land and shall file a report of the same with the county auditor together with a plat and profile thereof and shall thereupon proceed to determine the amount of damages sustained by each claimant, and may hear evidence in respect thereto, and may increase or diminish the amount awarded in respect thereto, and any party aggrieved may appeal from the finding of the board in establishing or refusing to establish the improvement district or from its finding in the allowance of damages to the district court by filing notice with the county auditor at any time within twenty days after such finding, at the same time filing a bond with the county auditor, approved by him, and conditioned to pay all costs and expenses of the appeal unless the finding of the district court shall be more favorable to the appel-

lant or appellants than the finding of the board, which appeal shall be tried in the district court as an ordinary proceeding, except that when the appeal is from the order of the board in establishing or refusing to establish the levee or drainage district, it shall be tried in equity and the appearance term shall be the trial term; the finding of the court in relation to the establishment of or refusal to establish the levee or drainage district shall be certified by the clerk of the board of supervisors, who shall enter an order in harmony therewith and proceed accordingly. If the appeal is from the amount of damages allowed, the amount ascertained in the district court shall be entered of record, but no judgment shall be rendered therefor. The amount thus ascertained shall be certified by the clerk of said court to the board of supervisors, who shall thereafter proceed as if such amount had been by it allowed the claimant as damages. If the appeal is from the action of the board in establishing or refusing to establish said drainage district, the court shall enter such order as may be proper in the premises, and the clerk of said court shall certify the same to the board of supervisors, who shall proceed thereafter in said matter in accordance with the order of the court. How the costs shall be distributed among the litigants and against whom the same shall be taxed shall rest in the discretion of the trial court.

Sec. 1989-a7. *Damages—By Whom—Division into Districts—Engineer.* The amount of damages finally determined by the board in favor of any claimant or claimants shall be required to be paid in the first instance by the parties benefited by the said levee or drainage district, or secured to be paid by sufficient bond to be fixed and approved by the county auditor, and after such damages shall have been paid or secured as aforesaid, the board shall divide said improvement into suitable sections, numbering the same consecutively from the source or

beginning of the improvement downward towards its outlet and prescribe the time within which the improvement shall be completed and appoint a competent engineer to have charge of the work of construction thereof, who shall be required before entering upon the work to give a bond to the county for the use and benefit of the levee or drainage district to be approved by the auditor in such sum as the board may fix, conditioned for the faithful discharge of his duties.

Sec. 1989-a8. *Letting Work—Notice—Bids.* The board shall cause notice to be given by publication, once each week, for two consecutive weeks in some newspaper published in the county wherein such improvement is located and such additional publication elsewhere as they may direct, of the time and place of letting the work of construction of said improvement, and in such notice they shall specify the approximate amount of work to be done in each section and the time fixed for the commencement and completion thereof; and when the estimated cost of said improvement exceeds fifteen thousand dollars the board shall make additional publication for two consecutive weeks in some contracting journal of general circulation, of such notice as they may prescribe, and they shall award contract or contracts for each section of the work to the lowest responsible bidder or bidders therefor, bids to be submitted, received and acted upon separately as to the main drain and each of the laterals, exercising their own discretion as to letting such work as to the main drain as a whole, or as to each lateral as a whole, or by sections as to both main drain and laterals, and reserving the right to reject any and all bids and readvertise the letting of the work. Each person bidding for such work shall deposit in cash or certified check a sum equal to ten per centum of the amount of the bid, not in any event, however, to exceed ten thousand dollars, said deposit to be re-

turned to him if his bid is not successful, and if successful to be retained as a guarantee only of his good faith in entering on said contract. The successful bidder shall be required to execute a bond with sufficient sureties in favor of the county for the use and benefit of the levee or drainage district in an amount equal to twenty-five per centum of the estimated cost of the work so let, or he may deposit such amount in cash with the auditor as security for the performance of his contract and upon the execution of such bond, or the making of such deposit, the deposit originally made with his bid shall be returned to him.

Sec. 1989—a-11. *Changes in Dimensions—Notice—Objections—Appeal.* That the law as it appears in section nineteen hundred eighty-nine-a eleven of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof.

If, after the establishment of said district, and before the completion of the drainage improvements therein, it shall become apparant that a levee or drain should be enlarged, deepened or otherwise changed or that a change or alteration in the location should be made for the better service thereof, said board may by resolution authorize such change or changes in the said improvement as the engineer shall recommend; provided that, whenever any change or changes are made either under this section or under any other section of this chapter, all persons whose land shall be taken or whose assessments shall be increased thereby shall first have been given like notices as provided in section nineteen hundred eighty-nine-a three of this chapter, and shall have like opportunity to file claims for damages, as provided for in section nineteen hundred eighty-nine-a four of this chapter, or file objection to such assessment as provided in section nineteen hundred eighty-nine-a

twelve of this chapter, as the case may be, and like opportunity to appeal from the action of the board as provided in section nineteen hundred eighty-nine-a of this chapter, as the case may be.

Sec. 1989-al2. *Assessment of Costs and Damages—Apportionment.* When the levee or drainage district or other improvement herein provided for shall have been located and established as provided for in this act, or when it shall be necessary to cause the same to be repaired, enlarged, re-opened or cleared from any obstruction therein, unless such repairs, reopening or clearing of obstruction can be paid for as hereinafter provided, the board shall appoint three commissioners, one of whom shall be a competent civil engineer and two of whom shall be resident freeholders of the state not living within the levee or drainage district and not interested therein or in like question, nor related to any party whose land is affected thereby; and they shall within twenty days after such appointment begin to personally inspect and classify all the lands benefited by the location and construction of such levee or drainage district, or the repairing or re-opening of the same, in tracts of forty acres or less according to the legal or recognized subdivisions in a graduated scale of benefits, to be numbered according to the benefit to be received by the proposed improvement; and they shall make an equitable apportionment of the costs, expenses, costs of construction, fees and damages assessed for the construction of any such improvement, or the repairing or re-opening of the same, and make report thereof in writing to the board of supervisors. In making the said estimate the lands receiving the greatest benefit shall be marked on a scale of one hundred and those benefited in a less degree shall be marked with such percentage of one hundred as the benefit received bears in proportion thereto. This classi-

fication when finally established shall remain as a basis for all future assessments connected with the objects of said levee or drainage district, unless the board, for good cause, shall authorize a revision thereof. In the report of the appraisers so appointed, they shall specify each tract of land by proper description and the ownership thereof as the same appears on the transfer books in the auditor's office, and the auditor shall cause notice to be served upon each person whose name appears as owner and also upon the person or persons in actual occupancy of any such land in the time and manner provided for the establishment of a levee or drainage district, which notice shall state the amount of special assessments apportioned to such owner, upon each tract or lot, the day set for hearing the same before the board of supervisors and that all objections thereto must be made in writing and filed with the county auditor on or before noon of the day set for such hearing. When the day set for hearing shall have arrived, the board of supervisors shall proceed to hear and determine all objections made and filed to said report and may increase, diminish, annul or affirm the apportionment made in said report or in any part thereof as may appear to the board to be just and equitable; but in no case shall it be competent to show that the lands assessed would not be benefited by the improvement, and when such hearing shall have been had the board shall levy such apportionment so fixed by it upon the lands within such levee or drainage district; and all installments of the tax shall be levied at that time, and shall bear interest at six per cent, per annum from that date; provided that if the owner of any parcel of land, lot or premises against which any such levy shall have been made and certified, shall, within twenty days from the date of such assessment, promise and agree in writing filed in the office of

the county auditor that in consideration of his having the right to pay his assessments in installments he will not make any objection of illegality or irregularity as to the assessment of benefits or levy of such taxes upon or against his property, but will pay said assessment, then said taxes levied against said land, lot or premises of such owner shall be payable as follows: one-third of the amount of said assessment at the time of filing the above agreement; one-third within ten days after the engineer in charge of said drainage improvement shall file a certificate in the office of the county auditor that said improvement is one-half completed, and the remaining one-third within ten days after the said improvement shall have been accepted by the board of supervisors, and if said installments are not paid as above provided, the failure to pay any installment shall cause the whole sum to become due and payable at once with interest at the rate of one per cent per month from the date of filing said agreement, and such assessments shall thereupon be collected as other taxes on real estate, which rate may be later reduced to correspond with the rate specified in the certificates or bonds, as the case may be. Provided, however, that no deferred installment of the amount assessed, as between vendor and vendee, mortgagor and mortgagee, shall become a lien upon the property against which it is assessed and levied, until the thirty-first day of December of the year next preceding that in which it is due and payable; and in case the board of supervisors shall increase said apportionment, service of notice thereof shall be made upon the owner of such tract or lot of land as shown by the transfer books in the auditor's office, in the same manner in which original notices are required to be served, where such owner is a resident of the county, and in case such owner is a non resident of the country such notice as to him shall be served on the actual occupant of

the tract or lot of land; provided that in case any railroad company shall be affected by such increased apportionment said notice shall be served upon the station agent of the said railroad company nearest the proposed improvement. If the first assessment made by the board of supervisors for the original cost or for repairs of any improvement as provided in this act is insufficient, the board may make an additional assessment and levy in the same ratio as the first for either purpose.

Sec. 1989-a14. *Appeal—Drainage Record—Counsel—Establishment Rescinded—New Hearing.* An appeal may be taken to the District Court from the order of the board fixing the assessment of benefits upon the lands in the same manner and time as herein provided for appeals from the assessment of damages, and such appeal may be taken from the order of the board of supervisors increasing the apportionment within twenty days after the completed service of notice of such increased apportionment in the same manner as herein provided for appeals in assessment for damages, whether objection was made to the report of the commissioner or not. The appeal herein provided for shall be tried in the District Court as an action in equity and the appearance term shall be the trial term; and when several appeals are taken and pending in the District Court by land owners of the same drainage district whose lands have been assessed by the board, the court may, in its discretion, order the consolidation of such cases, and try the same as one cause of action. When any appeal is taken from any order of the board made in any drainage proceeding coming before it for action, it shall be the duty of the board to employ counsel to represent the interests of the drainage district affected by said appeal on the trial thereof in the appellate courts and the expense thereof shall be paid out of the drainage fund of such district. In all actions

or appeals involving or affecting the drainage district, the board of supervisors shall be a proper party for the purpose of representing the drainage district, and all interested parties therein, other than the adversary parties thereto, and the employment of counsel by the board, as authorized by this chapter, shall be for the purpose of protecting all the rights of the drainage district and interested parties therein, other than the adversary parties thereto; in all appeals or actions adversary to the district, the appellant or complaining party shall be entitled the plaintiff, and the board of supervisors and drainage district it represents, the defendants, and in all appeals or actions for or in behalf of the district, the board of supervisors and the drainage district it represents may sue as and be entitled the plaintiffs. When an appeal authorized by this chapter is taken, the county auditor shall forthwith make a transcript of the notice of appeal and appeal bond and transmit the same to the clerk of the District Court, and the clerk shall docket the same upon payment by the appellant of the docket fee; and on or before the first day of the next succeeding term of the district court, the appellant shall file a petition setting forth the order of decision of the board appealed from and his claims and objections relating thereto; a failure to comply with these requirements shall be deemed a waiver of the appeal and in such case the court shall dismiss the same; it shall not be necessary for the appellee to file answer to the petition, unless some affirmative defense is made thereto, but he may do so. The board shall provide a book to be known as the drainage record and the county auditor shall keep a full and complete record therein of all proceedings of the board relating to drainage districts. In any case where the decree is or has been entered setting aside the establishment of a drainage district for errors in the

proceedings taken, and such decree becomes final, the board of supervisors shall recind its order establishing the drainage district, assessing benefits, and levying the tax based thereon, and shall also cancel any contract made for construction work or material, and may refund any or all assessments paid in. The board shall fix a new date for hearing, giving notice thereof by publication for two weeks and at the time so fixed, enter its order as to the establishment of the proposed district, and thereafter proceed as by law provided.

Sec. 1989-a15 *Obstructions—Nuisance—Abatement.* That the law appears in section nineteen hundred eighty-nine-a fifteen of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof: "Any ditch, drain or watercourse, which is now or hereafter may be constructed so as to prevent the surface and overflow water from the adjacent lands from entering the same, is hereby declared as a nuisance and may be abated as much. Any person, firm or corporation diverting, obstructing, impeding or filling up, without legal authority, any ditch, drain or watercourse, or breaking down any levee established, constructed or maintained under any provision of law, shall be deemed guilty of misdemeanor and punished accordingly."

Sec. 1989-a16. *Subsequent Proceedings—Use of Former Surveys.* In any proceedings heretofore or hereafter had for the establishment of a ditch; drain, levee or the changing of a natural watercourse, or the establishment of the levee or drainage district where an engineer has been appointed and has made a complete survey, return and plat thereof and for any reason the improvement has been abandoned and the proceedings dismissed and afterwards proceedings are instituted for the establishment of a levee or drainage district, or the changing (of) a natural watercourse, for the bene-

fit or reclamation of the same territory surveyed in said former proceedings, or part thereof, or the same with territory additional thereto, the engineer shall use the return, levels and surveys, plat and profile made in said former proceedings, or so much thereof as may be applicable and in case the cost of said returns, levels, surveys, plat and profile made in said former proceedings have been said for by the former petitioners or their bondsmen, then a reasonable amount shall be allowed said petitioners or bondsmen for the use of the same.

Sec. 1989-a21. *Control — Repairs — Cost.* Whenever any levee or drainage district shall have been established and the improvement constructed as in this act provided, the same shall at all times be under the control and supervision of the board of supervisors and it shall be the duty of the board to keep the same in repair and for that purpose they may cause the same to be enlarged, reopened, deepened, widened, straightened or lengthened for a better outlet, and they may change or enlarge the same or cause all or any part thereof to be converted into a closed drain when considered for the best interests of the public rights affected thereby. The cost of such repairs or change shall be paid by the board from the drainage fund of said levee or drainage district, or by assessing and levying the cost of such change or repair upon the lands in the same proportion that the original expenses and cost of construction were levied and assessed, except where additional right of way is required or additional lands affected thereby, in either of which cases the board shall proceed as hereinbefore provided; provided, however, that if the repair is made necessary by the act or negligence of the owner of any land through which such improvement is constructed or by the act, or the negligence of his agent or employe, or if the same is filled and obstructed by

the cattle, hogs or other stock of such owner, employe or agent, then the cost thereof shall be assessed and levied against the lands of such owner alone.

Sec. 1989-a26. *Special Assessment—How Paid —Improvement Certificates—Waivers.* The special assessment for benefits made by the commissioners appointed for that purpose, as corrected and approved by the board of supervisors, shall be levied at one time by the board against the property so benefited, and when levied and certified shall be payable at the office of the county treasurer. If the owner of any parcel of land, lot or premises against which any such levy shall have been made and certified, which is embraced in any certificate provided for in this section shall within thirty days from the date of such assessment promise and agree in writing endorsed upon such certificate, or in a separate agreement, that in consideration of having the right to pay his assessment in installments, he will not make any objection of illegality or irregularity as to the assessment of benefits, or levy of such tax upon and against his property, but will pay said assessment with interest thereon at such rate not exceeding six per centum per annum as shall be prescribed by resolution of the board, such tax so levied against the land, lot or premises of such owner shall be payable in ten equal installments, the first of which with interest on the whole assessment shall mature and be payable on the date of such assessment, and the other with interest on the whole amount unpaid annually thereafter at the same time and in the same manner as the March semiannual payment of ordinary taxes; but where no such terms and agreement in writing shall be made by the owner of any land, lot or premises then the whole of said special assessment, so levied upon and against the property of such owner, shall mature at one time and be due and payable with in-

terest from the date of such assessment, and shall be collected at the next succeeding March semiannual payment of ordinary taxes. All of such tax with interest shall become delinquent on the first day of March next after its maturity and shall bear the same interest with the same penalties as ordinary taxes. And the board may provide by resolution for the issuance of improvement certificates, payable to bearer or to the contractors who have constructed the said improvement or completed part thereof within the meaning of this act in payment or part payment therefor, each of which certificates shall state the amount of one or more assessments or part thereof made against the property designating it and the owners thereof liable to assessments for the cost of same and said certificate may be negotiated. Such certificates shall transfer to the bearer, contractor or assigns all right and interest in and to the tax in every such assessment or part thereof described therein, and shall authorize such bearer, contractor or assignee to collect and receive every assessment embraced in said certificate, by or through any of the methods provided by law for their collection, as the same mature. Such certificates shall bear interest not to exceed six per centum per annum, payable annually, and shall be paid by the taxpayer to the county treasurer who shall receipt for the same and cause the amount paid to be applied to the payment of the certificate issued therefor. Provided, that any person shall have the right to pay the full amount of the tax so levied against his property, together with interest thereon to date of payment at any time he desires so to do, even before the maturity of any certificates issued therefor. No certificate shall be issued or negotiated for the use of the drainage district for less than par value with accrued interest up to the delivery or transfer thereof. Should the costs of such work exceed the

> amount of benefits assessed and certificates issued, a new apportionment and levy of tax may be made and other certificates issued in like manner. If the board of supervisors provides for the issuance of improvement certificates by the owners of lands, the township trustees may execute waivers, and there may be issued improvement certificates for such part of the assessment for benefits to highways as is to be paid by the township, such waivers and certificates to conform as nearly as may be to those executed upon the assessments against lands.

The action of the Board of Supervisors complained of by plaintiffs in error was had and taken under this last section of the Iowa State, to-wit, Section 1989-a-21. There is no requirement in the Iowa Statute necessitating the giving of notice of the intention or purpose of the Board of Supervisors to repair a drainage improvement, or to let a contract, or to advertise for bids for the construction of such improvement. The Supreme Court of Iowa, in discussing the absence from the statute of any such requirement said:

> "This responsibility, Section 1989-a-21 places upon the Board of Supervisors. The duty is one which is continuous, calling for supervision from day to day and month to month, or, in the language of the statute, 'at all times.' The work to be done may involve considerable expense or it may be a succession of petty repairs each of which is comparatively inexpensive. To require that in each case the Board must advertise the job and seek the lowest bidder would be to hamper and prevent its efficient action without any corresponding benefit to the public. It is not at all strange that a drainage system once completed and put to practical use should develop here and there a defect, and if such

defect can be remedied or the efficiency of the system be increased by lowering the bottom of the channel at some point or by widening the cut in another place the right of the board to which the duty of care and maintenance is committed, to do what ought to be done to that end, ought not to be unreasonably restricted.

The contract between the Board and Hiatt to which the plaintiffs object, appears to be fairly and clearly within the scope of the power and responsibility conferred by this section. Even if the terms of the contract be as broad and comprehensive as plaintiffs say they are, they are still not in excess of the authority expressly given to 'enlarge, reopen, deepen, widen and straighten' the completed ditches for the purpose of keeping them in repair and maintaining them in efficient working order. *The statute imposes no duty to give notice in advance of each separate work of repair,* or to advertise the same for competitive bids—except, perhaps, as may be implied in the proviso at the end of the section which seems to recognize such necessity where additional right of way is to be taken and this reservation is sufficient, in our judgment, to obviate any possible objection on constitutional grounds."

In the instant case no additional right of way was taken or appropriated by the Board of Supervisors in the work of repairing, cleaning, and deepening the old drainage ditch. It is true that the contractor extended the outlet of the ditch a short distance. He neither asked nor received pay for this work of extending the outlet beyond its original end. Plaintiffs in error were not injured in any way and no assessment for such extension was levied against the lands of the plaintiffs in error. The Supreme Court of Iowa, in passing upon this point, said:

> "The charge in the plaintiff's petition and repeated in argument that the work contracted for and done included a lengthening or extension of the ditch or ditches beyond their original dimensions is not justified by the record, but as we have said it is to be conceded that the channels were not only reopened, cleaned and emptied of silt and obstructions, but were in part, to some extent materially deepened."

The Supreme Court of Iowa (p. 89 R) said:

> "It further appears that the contractor extended an excavation beyond the district limits a short distance in order to facilitate the successful operation of the drainage system, but for this work he testifies he neither asked nor received compensation and his statement does not appear to be disputed."

It is, therefore, obvious that the finding and determination of the Supreme Court of Iowa on this determinative fact question is against the contention of the plaintiffs in error. If we correctly understand the position of the plaintiffs in error in this court, they do not contend that if the work done by the Board of Supervisors and the contractor Hiatt was merely to repair the old improvement and assess the cost thereof against the lands of the plaintiffs in error, that no rights of the plaintiffs in error protected by the Federal Constitution were invaded or violated; but it is the contention of the plaintiffs in error, that the work performed by the Board of Supervisors and the contractor constituted, in fact, a new improvement under the guise of repair. We do not see how this claim can with any force be urged upon the consideration of this court, for the reason that the Su-

preme Court of Iowa, which hears equity cases *de novo*, specifically and definitely determined this fact question against the plaintiffs in error. This fact question, being determinative of this controversy, necessarily entitled the defendants in error to a dismissal of the writ of error and an affirmance of the judgment of the Supreme Court of Iowa.

Where a determinative non-Federal question, and also a Federal question, are involved, the decision of the State Supreme Court on the determinative non-Federal question is conclusive of the rights of the parties to this litigation, notwithstanding an adverse decision of the Supreme Court upon the Federal question raised and involved in this cause. The court has repeatedly held that even the decision by the State Court of a Federal question will not sustain the jurisdiction of the court if another question, not Federal, was also raised and decided against the plaintiffs in error, or the decision thereof be sufficient notwithstanding the Federal question, to sustain the judgment.

In *Harrison* v. *Morton* (171 U. S. 38, 18 S. C. Rep. 742) the court said, on page 745:

> "It is settled law that to give this court jurisdiction of a writ of error to a State Court, it must appear affirmatively not only that a Federal question was presented for decision by the State Court, but that its decision was necessary to the determination of the cause and that it was actually decided adversely to the party claiming the right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without de-

ciding it (*Murdock* v. *Memphis*, 20 Wall. 590; *Cook County* v. *Calumet, et al.*, 138 U. S. 635, 11 S. C. Rep. 435). It is likewise settled law that where the record disclosed that *if a question has been raised and decided adversely to the party claiming the benefit of a provision of the Constitution or Laws of the United States and another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment* (*Wade* v. *Lawder*, 165 U. S. 624, 17 S. C. Rep. 425)."

Waters Pierce Oil Company v. *State of Texas*, 29 S. C. Rep. 227.

Mellon & Company v. *McCaffrey*, 239 U. S. 134, 36 S. C. Rep. 94.

We assume that it is not the province of this court to re-investigate disputed fact questions and to reverse the judgment of a Supreme Court upon a finding of fact, but that this court will accept as a verity and as a finality the finding of a State Supreme Court upon disputed facts and accept with full faith the correctness of such fact determination. Plaintiffs in error in their brief re-argue disputed fact questions, notwithstanding the judgment of the Supreme Court of Iowa determining the actual facts to be hostile to the contention of the plaintiffs in error.

The Law Question.

(b) The law question calls for a decision of this court as to whether or not certain sections of the Iowa Drainage Law violate the Constitution of the United

States, to-wit, was the property of the plaintiffs in error appropriated without due process of law?

A drainage ditch necessarily begins to deteriorate immediately following its original construction. This deterioration may be produced by an infinite number of causes—the nature of the soil, the flow of water, storms, the crumbling and falling away of the banks, are perhaps the principal factors causing such deterioration. Unless the ditch is kept in repair the entire project or reclamation of the swamp and overflowed lands becomes a nullity. In such event the burdens of special assessments imposed upon lands for the original construction of the ditch would be without corresponding benefits to the land. The Iowa Legislature foresaw, at the time of the passage of the drainage law, the necessity of keeping open, free and clean the drainage ditches of Iowa, and under Code Section 1989-a-21 above quoted, the duty is specifically placed upon the board of supervisors to at all times see to it that the ditches are kept open and in repair, and if they do not work efficiently to cause the removal of the difficulty. We urge upon the attention of the court the fact that the complaint of the plaintiffs in error is not founded upon the action of the board of supervisors of Pocahontas County in the original establishment of the ditch, or in levying the original assessment for the cost of the original construction of the ditch, but years after such ditch was constructed, and while the ditch was in an ineffective and inefficient condition, the board, following the injunction and requirements of the statute, took such action as to repair the

defects and restore the ditch to an efficient condition, and the cost of such restoration was assessed, not against the plaintiffs in error, but against the lands in the drainage district, on the basis and in the proportion as adopted when the first or original assessment was made for the original construction of the ditch. This action of the board in levying this second assessment against the lands in the drainage district for the cost of repair was taken under Section 1989-a-21 of the Statutes of Iowa, as follows:

> "The cost of such repairs or change shall be paid by the Board from the drainage fund of said levee or drainage district, *or by assessing and levying the cost of such change or repair upon the lands in the same proportion that the original expenses and cost of construction were levied and assessed.*"

Section 1989-a-12 of the drainage law, set forth in the preceding pages of this brief, provides how the original assessment shall be made, how the lands in the drainage district shall be classified. Among other provisions of this latter section is the following:

> "If the first assessment made by the Board of Supervisors for the original cost or for repairs of any improvement as provided in this Act is insufficient, the Board may make an additional assessment and levy in the same ratio as the first for either purpose."

NOTICE.

Code, Section 1989-a-3, provides for and requires the giving of notice to the landowners of the time and place of hearing that the petition for the assessment of

a drainage district will be held and passed upon by the Board of Supervisors.

Code, Section 1989-a-4, provides an opportunity for the landowners to file claim for damages.

Code, Section 1989-a-6, affords the landowners an opportunity to appeal from the finding of the Board to the District Court on the allowance of damages.

Code, Section 1989-a-12, determines the method of assessment and fixes the rule for the apportionment and ascertainment thereof.

Code, Section 1989-a-14, affords the aggrieved landowners an appeal to the District Court from the action of the Board of Supervisors on the classification of lands, apportionment of the assessment and the levying thereof.

It is, therefore, most obvious that the constitutional rights of the landowner are adequately and completely safeguarded by the foregoing provisions of the Iowa law. The landowner is entitled to notice of the time and place of hearing of every act of the Board in the establishment of the drainage improvement and in the levying of the assessment to defray the expenses and cost thereof. The landowner, therefore, has, or is entitled to, under the foregoing provisions of the law, his day in court. Due process is completely proffered to him. Surely, it cannot seriously be contended that any constitutional right is invaded or violated by the action of the Legislature of the State of Iowa in passing a law that all future assessments for repairs of a drainage ditch shall be paid by levying an assessment on the same basis

and in the same proportion that the original assessment for the original cost was levied. At the time the original assessment was levied the Iowa statutes provided for and contemplated future assessments upon the same basis as the original assessment to cover the cost of repairs of the ditch. Plaintiffs in error knew of this law, they were bound by its provisions, they had the right not only to protect themselves against an unjust or unfair original ratio of assessment, but at that time and place they were entitled to raise and have determined, by the Board of Supervisors or by the courts of the State of Iowa, the question of the justice and correctness of the original classifications of the land and the ratio of, not only the assessment levied for the original cost of the improvement, but future assessments for the repair of the ditch. It cannot be contended that the plaintiffs in error had the constitutional right to appear before the Board and object to the letting of the contract for repairs. The Iowa statute provides for no such notice; the plaintiffs in error were not entitled to such a notice or to a hearing upon that question. The plaintiffs in error cannot successfully assert the claim that they have the constitutional right to appear before the Board of Supervisors and object to the proposed action of the Board in determining the legislative question of whether or not the Board should clean out and repair the ditch. No claim is made by the plaintiffs in error that any of their real estate was appropriated or taken for public use in the cleaning or repairing of the ditch, their claim being based solely and exclusively upon the theory that their prop-

erty is being taken without due process of law for the reason that the Board has levied an assessment against their property for the cost, not of a new improvement, but rather, to repair an existing one. The plaintiffs in error claim that they were entitled to notice of the proposed action of the Board of Supervisors in levying the additional assessment to defray the cost of the repair. They claim that they had the right, afforded them by the Constitution, to appear before the Board and file objections to such proposed action. Even if they did so appear before the Board of Supervisors, the Board would be powerless, under the Iowa statute, to afford any relief to the plaintiffs in error in reference to the amount of the assessment that might be levied against any particular tract of land, or in reference to the classification into high, low, wet or swamp lands. The classification of the lands of the plaintiffs in error into the foregoing four sub-divisions, under the drainage law, was had and irrevocably fixed long prior to any action of the Board taken in reference to the repair or cleaning of the ditch. The plaintiffs had, long years before that time, due process of law and their day in court to object to such classification. Under the Iowa Drainage Law the amount and ratio of assessment for benefits is determined and fixed by the classification of the land into "high low, wet or swamp" lands. This classification once made becomes irrevocable in the absence of judicial interference, and all subsequent assessments levied for the purpose of defraying expenses to keep the drainage system efficient must, under the provisions of the Iowa

statute, be apportioned upon the basis of the original classification and original ratio of assessment. What rights, then, could the plaintiffs in error assert, if notice was given to them and they did appear before the Board of Supervisors to object to the proposed assessment to pay the costs of repairs? Such protests, such hearing, such objections would be void of results, for the reason that the Board of Supervisors, in levying such additional assessment, under the Iowa statute, have only the simple duty to perform of ascertaining the cost of the repairs and assess it against all lands in the district on the basis and in the ratio of the original assessment. It is not true, and we deny the assertion, that the landowner is entitled to notice and hearing of every proposed assessment or levying of taxes. This very question has repeatedly been before this court, and this court has announced frequently the rules which we now invoke in this cause.

We quote from the case of *Hagar* v. *Reclamation District* (111 U. S. 701; 4 S. C. Rep. p. 667). The opinion was by Mr. Justice Field:

> "The appellant contends that this fundamental principle was violated in the assessment of his property, inasmuch as it was made without notice to him or without his being afforded any opportunity to be heard respecting it; the law authorizing it containing no provision for such notice or hearing. His contention is that notice and opportunity to be heard are essential to render any proceeding due process of law which may lead to the deprivation of liberty or property. * * * But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice

to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of delay upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments. As stated by Mr. Justice Bradley in his concurring opinion in *Davidson* v. *New Orleans*: 'In judging what is "due process of law" respect must be had to the cause and object to the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or some of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law," but if found to be arbitrary, oppressive and unjust, it may be declared to be not "due process of law."' The power of taxation possessed by the state may be exercised upon any subject within its jurisdiction, and to any extent not prohibited by the Constitution of the United States. As said by this court: 'It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness: It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the state, as to the mode, form and extent of taxation, is unlimited where the subjects to which it applies are within her jurisdiction. (State Tax on Foreign-held Bonds, 15 Wall, 319.) Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, *no notice can be given to the tax-payer, nor would notice be of any possible advantage to him*, such as poll-taxes, license taxes

(not dependent upon the extent of his business), and, generally, specific taxes on things or persons or occupations. In such cases the Legislature in authorizing the tax fixes its amount, and that is the end of the matter. If the tax be not paid the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the tax-payer. No right of his is therefore invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard or bushel or gallon, there is nothing the owner can do which can effect the amount to be collected from him. So if a person wishes a license to do business of a particular kind, or at a particular place, such as keeping a hotel or restaurant, or selling liquors or cigars or clothes, he has only to pay the amount required by the law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the state, or on domestic corporations for franchises, if the parties desire the privilege they have only to pay the amount required. In such cases there is no necessity for notice or hearing. *The amount of the tax would not be changed by it.* But where a tax on property is levied not specifically, but according to its value, to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially, and in most of the states provision is made for the correction of errors committed by them through Boards of Revision or Equalization, sitting at designated periods provided by law, to hear complaints respecting the justice of the assessments.

> The law, in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law."

Let us apply the foregoing rules to the case at bar and what is the result? In levying the lands of the plaintiffs in error to cover the cost of repairs, the Board of Supervisors was not acting in a judicial capacity. They were not ascertaining the value of plaintiffs' property. When it was determined what the cost of the repair was, it was the duty of the Board of Supervisors, under the Iowa statute, to forthwith make and levy a special assessment against all the lands in the drainage district upon the same ratio as the original assessment was made. There was no need of a hearing by the plaintiffs in error in such a case. No rights of the plaintiffs were invaded. The tax was determined and ascertained when the cost of the improvement was known and the Board of Supervisors was divested of any discretion as to the amount that should be levied against any particular tract of land in the drainage district. The Legislature of the State of Iowa has jurisdiction over the lands of the plaintiffs in error. The Legislature has the power to delegate to the Board of Supervisors the exercise of such jurisdiction. The Board of Supervisors, therefore, had the power to classify at the time of the original construction of the ditch the lands of the plaintiffs in error and to determine for all future time the basis or ratio of subsequent assessments to cover the cost of keeping

efficient the drainage system. The assessments complained of are not personal. They are against the lands within the drainage district. Let us assume that hereafter it shall become necessary for the Board of Supervisors of Pocahontas County to again claim this drainage ditch and keep it in repair, incurring expenses thereby, could it be successfully maintained that the future grantees of the present plaintiffs in error would be entitled to a new hearing and a reopening of the question of the original classification of the lands within the drainage district because they had no notice or knowledge of the action of the Board in cleaning and repairing the ditch and levying the special assessment against the lands in the district, to defray the cost of such repair and cleaning? Surely, such a contention could not seriously or effectively be asserted or maintained. The Legislature has taken away from, or rather, never delegated to the Board of Supervisors any discretion in levying any future assessments after the original assessment. The plaintiffs in error claim that they are entitled to a hearing on the question whether the benefits to their different tracts of land would be in accord with the original classification. Surely this cannot be seriously presented to the consideration of this court. If it is, then we suggest that the question is foreclosed against the plaintiffs in error by the decisions of Your Honors.

This court, speaking through Mr. Justice Van Devanter, in *Embree* v. *Kansas City et al.* (240 U. S. 242; 30 L. Ed. 629; 36 S. C. Rep. 317), said:

"The claim that the landowners are entitled to a hearing on the question whether the benefits in the different zones will be in accord with the graduated ratings of their lands is not seriously pressed upon our attention and requires but brief notice. *The ratings are not fixed in the exercise of delegated authority, but by the statute itself,* which must be taken as a legislative decision that in a district lawfully constituted in the manner before indicated, the benefits to the lands in the different zones will be in approximate accord with the ratings named. This being so, no hearing is essential to give effect to this feature of the apportionment. A legislative act of this nature can be successfully called in question only when it is so devoid of any reasonable basis as to be essentially arbitrary and an abuse of power. (Citing many cases.) * * * The claim that the landowners are not afforded an opportunity to be heard in respect of the value of their lands is also untenable. While no hearing is given when the lands are appraised, one is accorded when the tax is sought to be enforced. The mode of enforcement is by a suit in a court of justice, when, as the Supreme Court of the State holds, owners aggrieved by the valuation may have a full hearing upon that question." (*Davidson* v. *New Orleans, supra.*)

In the cases at bar the plaintiffs in error had their day in court, their notice, their opportunity to be heard, when their lands were originally classified, when the original assessment was made, and it is the specific direction of the statute that all subsequent assessments for the cost of repairs shall be levied upon the basis of the original assessment. Surely, this is due process of law.

"The Legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do

so, and may settle both questions for itself and when it does so, its action is necessarily conclusive and beyond review. Here an improvement has been ordered and made, the expense of which might justly have been imposed upon adjacent property benefited by the change. By the act of 1881, the Legislature imposes the unpaid portion of the cost and expense, with the interest thereon, upon that portion of the property benefited which has thus far borne none of the burden. In doing so, it necessarily determines two things, viz., the amount to be realized, and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement; and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakably unjust, is not open to our review. The question of special benefit, and the property to which it extends, is of necessity a question of fact; and when the Legislature determines it in a case within its general power, its decision must, of course, be final. * * * The precise wrong of which complaint is made appears to be that the landowners now assessed never had opportunity to be heard as to the original apportionment, and find themselves now practically bound by it as between their lots and those of the owners who paid. But that objection becomes a criticism upon the action of the Legislature, and the process by which it determined the amount to be raised and the property to be assessed. Unless by special permission, that is, a hearing never granted in the process of taxation. The Legislature determines expenditures and amounts to be raised for their payment, the whole discussion and all questions of prudence, propriety and justice, being confided to its jurisdiction. It may err, but the courts cannot review its discretion." *Spencer* v. *Merchant*, 125 U. S. 345; 8 S. C. Rep. 921.

This court announced the foregoing rule in a case where after an assessment for improving a street was partly paid it was declared void for want of any hearing or notice and the unpaid portion was cancelled. Subsequently the legislature directed an assessment of the amount so cancelled, with interest, upon the lands upon which the former assessment was not paid, and provided for an apportionment with notice thereof. In this case Your Honors held that it was not an attempt to deprive any person of property without due process of law, it being within the power of the legislature to determine not only the amount of the tax to be levied for public improvements, but also the class of lands which shall bear the burden. Tax statutes should be liberally construed and tax proceedings will not be declared lacking in due process of law by enforced collection of taxes merely because it may in individual cases work hardships and unequal burdens.

King v. *Mullins, et al*, 171 U. S. 404; 18 S. C. Rep. 925; 43 L. Ed. 214.

Kelly v. *Pittsburg*, 104 U. S. 78, 26 L. Ed. 659.

Hodge v. *Muscatine Company*, 176 U. S. 276, 25 S. C. Rep. 231, 39 L. Ed. 477.

The power to tax is a legislative power and may not be delegated for municipal purposes to a body of persons not elected by and immediately responsible to the people.

State v. *Mayor et al.*, 103 Iowa, 76.

Nothing is to be found in the Constitution of the State of Iowa limiting the power of the legislature to

delegate authority to levy special assessments save as it denies the right to take property without due process of law. The Iowa Drainage Law is not inimical to this.

Yeomans v. *Riddle*, 84 Iowa, 147.

There is no constitutional requirement or principle of law exacting that the officers who apportion the cost and levy the assessment to pay the same against the lands benefited by the improvement shall be chosen by the electors of the district.

Munn v. *Board of Supervisors*, 161 Iowa 26-36.

This court in *Wurtz* v. *Hoagland* (114 U. S. 615, 29 L. Ed. 232, 5 S. C. Rep. 1091), in construing the drainage statute of the state of New Jersey, said:

> "The statute of 1871 is applicable to any tract of land within the state which is subject to overflow from freshets, or which is usually in low, marshy, boggy, or wet condition. It is only upon the application of at least five owners of separate lots of land included in the tract that a plan of drainage can be adopted. All persons interested have opportunity by public notice to object to the appointment of commissioners to execute that plan, and no commissioner can be appointed against the remonstrance of the owners of the greater part of the lands. All persons interested have also opportunity by public notice to be heard before the court on the commissioner's report of the expense of the work, and of the lands which, in their judgment, ought to contribute, as well as before the commissioners; and on any error in law or in the principles assessment, before the court, upon the amount of the assessment. As the statute is applicable to all

lands of the same kind, and as no person can be assessed under it for the expense of drainage without notice and opportunity to be heard, the plaintiffs in error have neither been denied the equal protection of the laws, nor been deprived of their property without due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States."

Almost the identical question that arose in the case at bar was presented to the consideration of the Supreme Court of Delaware in *English* v. *Mayor of the City of Wilmington, et al.*, (2 Md. 91, 37 Atl. Rep. 163). An Act of the Legislature of Maryland passed April 29, 1891, provided that the cost of constructing a complete sewer system for a city shall be assessed on all property adjoining a sewer or with access thereto, at a fixed and uniform rate per foot of frontage, and per square foot of area to a certain depth. It was held that it was a valid exercise of legislative discretion in assessing benefits, and it was no objection to the constitutionality of said statute that the amount of the assessment was based upon an estimate of the cost of the sewer system, and the statute did not deprive the assessed abutters of their property without due process of law because it did not provide for notice and hearing before the assessment was levied, and that the Legislature of Maryland might, without notice to property owners to be assessed, fix the amount per foot of frontage and square foot of area which property adjoining a sewer shall be assessed. On page 161 of the Atlantic Reporter, *supra*, the Supreme Court of Maryland said:

"Judge Cooley sums up so admirably the grounds upon which the courts would undertake to decide that the Legislature had exceeded its authority in such exercise of the taxing power that I will quote and adopt his language, as follows: 'It is conceded that the legislative judgment that a certain district is or will be so far specially benefited by an improvement as to justify a special assessment is conclusive, and that its determination as to what shall be the basis of the assessment is equally conclusive. To invoke the intervention of a court for relief against the results of its conclusion is to invoke the judicial authority to give its judgment controlling effect over that of the legislature, in a matter of the apportionment of a tax, which by concession on all sides is purely a matter of legislation. This is confessedly inadmissible, in any case where the legislative power has not been exceeded by an apportionment merely colorable. * * * In the act under consideration it is clearly the opinion of the court that the legislature had acted within their legitimate sphere, so far as the objections hitherto considered are concerned, which cannot be sustained either on principle or authority. The following are some of the cases in which the courts in other states have sustained similar statutes, for the method of apportionment adopted by the legislature in this case seems to have become increasingly popular of late years throughout the Union: *Cleveland* v. *Tripp*, 13 R. I. 60; *McGee* v. *Com.*, 46 Pa. St. 358; *Palmer* v. *Stumph*, 29 Ind. 329; *Allen* v. *Drew*, 44 Vt. 174; *Ernst* v. *Kunkle*, 5 Ohio St. 520; *Parker* v. *Challiss*, 9 Kan. 155; *Motz* v. *City of Detroit*, 18 Mich. 495; *State* v. *Fuller*, 34 N. J. Law. 227; *City of St. Louis* v. *Clemens*, 49 Mo. 552; *Emery* v. *Gas Co.*, 28 Cal. 345. * * *

The ground is now clear for the remaining and more important objection to the constitutionality

of the act, viz. the want of notice; it being strongly urged and ably argued by counsel that the want of notice is fatal to the validity of the assessment on the fundamental principles of civil liberty, and more especially because of the due process of law clause in the Fourteenth Amendment to the Constitution of the United States. Whenever the first method of assessment above referred to is adopted by the legislature, viz. an assessment made by assessors or commissioners, appointed for the purpose under legislative authority, and who are to view the estates and levy the expense in proportion to the benefits which, in their opinion, the estates, respectively, will receive from the work proposed, it is now unquestioned and unquestionable that an opportunity for a hearing is absolutely necessary to the validity of the assessment. That is so clear that it is remarkable that it should have been litigated at so late a date as the well known New York case of *Stuart* v. *Palmer*, 74 New York 183. The question has been repeatedly discussed, however, when the second method has been adopted; that is, when the Legislature, as in this case, itself fixed upon some definite standard, which is applied to estates by a measurement of length of quantity or by a value independently fixed. In such cases it is argued that nothing remains to be done to fix upon each individual the amount of his assessment except to make a mathematical calculation, and as a hearing or an opportunity for a hearing would therefore be useless and futile, the maxim, '*Cessante ratione, cessat et ipsa lex*,' would apply. It seems impossible to find any valid distinction between the unquestioned power of the Legislature to impose, without notice, or opportunity for a hearing such taxes as poll taxes, license taxes (not dependent upon the extent of the individual's business), and generally, specific taxes on things or persons or occupations, and their power to impose, in the same manner,

that kind of tax called 'special assessment for local improvement,' subject, of course, to the limitations already set forth, which are inherent in the nature of the taxing power, and have been already dwelt upon at great length. In the case of the taxes first above enumerated the legislature, in authorizing the tax, fixes its amount and that is the end of the matter. But the Supreme Court of the United States is the tribunal to which we must look for the authoritative construction of the Fourteenth Amendment to the United States Constitution and its application to this question of notice. There is a series of decisions of that court, bearing more or less directly upon this question, which are referred to and reviewed in every well-considered case upon the subject. It will not be necessary, however, to cite or review them all, for they are all reviewed fully in the two cases from which I shall quote at length, *Hagar* v. *Reclamation District*, 111 U. S. 701. * * * But in the statute of 1881 the legislature itself determined what lands were benefited and should be assessed. But this statute, the legislature, in substance and effect, assumed that all the lands within the district defined in the statute of 1869 were benefited in a sum equal to the amount of the original assessment, the expense of levying it, and interest thereon; and determined that the lots upon which no part of that assessment had been paid, and which had therefore as yet borne no share of the burden, were benefited to the extent of a certain portion of this sum. That these lots as a whole had been benefited to this extent was conclusively settled by the legislature. The statute of 1881 afforded to the owners notice and hearing upon the question of the equitable apportionment among them of the sum directed to be levied upon all of them, and thus enabled them to contest the constitutionality of the statute and that was all the notice and hearing to which they were entitled. In

this holding that the legislature, without notice, could conclusively settle that the lots upon which no part of the void assessment had been paid, and which, as we have seen, were isolated parcels not contiguous, and many of them not fronting on the avenue, should be assessed a certain portion of a certain sum imposed upon all the lots within the district created by the act under which the void assessment was made, it would seem that the Supreme Court necessarily implied that the Legislature could also have conclusively settled, if it had seen fit so to do, the portion of that portion which each one of the selected lots should be assessed; provided that, under the general laws of New York, it would have been possible for the lot owners to contest the constitutionality of the act. It is impossible to conceive of any objection to the power of the Legislature to fix without notice the amount of the assessment upon the individual lots of such a selected group of lots which would not apply with equal force to fixing it upon such a group. If it could distribute the amount between different groups of lots, why could it not distribute the amount apportioned to a group, between the individuals of a group? It is true that in the concluding paragraph of the clause above cited Justice Gray refers to the notice and hearing granted to the individual lot owners, but it is to be remembered that the mode of apportionment between them was according to the judgment of commissioners as to the amount of benefit, which necessarily depended upon and required a hearing, and the hearing of such a hearing upon the point decided by the court would seem to be indicated by the concluding sentence of the above quoted clause, in which Justice Gray says: 'It thus enabled them to contest the constitutionality of the statute, and that was all the notice and hearing to which they were entitled.' But under

> the laws of this state any property owner whose rights were affected by the statute now under consideration could at the proper time test the constitutionality of the act, and, further, could institute proceedings for the correction of injustice, fraud, or error in making the mathematical calculations. Thus are also met the requirements laid down by the Supreme Court in the case we have already cited of *Davidson* v. *City of New Orleans*, 96 U. S. 97. The Rhode Island Courts have sustained statutes almost identical with this one."

We quote from Mr. Justice Brewer, in *Gillette* v. *City of Denver* (2 Fed. Rep. 823). This is a sewer assessment case where the assessment was imposed upon the property within the district according to the area, and the objection was raised that no notice was provided, and there was therefore no due process of law:

> "Now, in this case, the tax is laid by the area; no question of value, no matter of judgment—a mere mathematical calculation; and of what earthly profit could it be to a taxpayer to have notice of that calculation? He can make it himself. He cannot correct by testimony the judgment of anybody; it is as exact and settled as anything can be."

Apply the foregoing rules to the case at bar, and we have this result: the ratio of assessment complained of in the case at bar was definitely and specifically settled by the Act of the Legislature of the State of Iowa. The drainage law instructs and requires the Board of Supervisors, after it ascertains the amount of the cost of repairing the ditch, to assess this entire cost upon all the lands within the district upon the same basis and the same ratio as the original assessment was made. The Legis-

lature in determining how this assessment for repairs should be made, did not vest in any tribunal the right to determine the valuation of the lands or to exercise any judgment thereon. It merely clothed the Board of Supervisors with the power to execute a mathematical calculation; and of what earthly profit could it have been to plaintiffs in error to have notice of that calculation?

Practically the same question involved in this case came before the Supreme Court of Missouri (115 S. W. p. 549), in the case of *State, et rel. Brown* v. *Wilson.* This case involved the construction of a drainage statute, and the levying of a second assessment to cover the cost of the ditch. The Supreme Court of Missouri said:

> "The validity of that judgment is assailed by counsel for the defendant for the reason assigned, that it was rendered without notice to their client. It is conceded by counsel for plaintiff that defendant was not notified of the fact that the petition asking for the second assessment had been filed in the county court, or that a trial would be had thereon, without it can be successfully maintained that when he entered his appearance in court, by petitioning the court in the first instance to incorporate the district and order the improvements made, he was in court at all times for all purposes until the case was fully and finally disposed of. To be a little more specific as to the position and contentions of opposing counsel: Counsel for defendant contends that the second assessment is invalid, null, and void, for the reason that he was not notified of the proceedings which resulted in making the assessment, and that the judgment of the county court making the same, and the judgment of the Circuit Court confirming that of

the county court are also null and void, notwithstanding the fact that Section 8337 authorized the county court to make assessment 'without notice' to the landowners. That section of the statute is assailed as being unconstitutional because it authorizes the taking of property without due process of law. While, upon the other hand, counsel for plaintiff insist that when defendant entered his appearance by siging the petition asking the county court to have the improvemets made, he was in court for all purposes, and remained there as long as the court had any duties to perform in the case, and until it was finally disposed of; that, being in court, the law required him to take notice of every step taken, order made, and judgment entered by the court, just as one is required to do in any ordinary case pending in the county or circuit court. They also insist that the real and only true assessment of benefits recommended by the commissioners and made by the court is the one stating that the land would be benefited from $25 to $30 per acre by the proposed improvements, and that the so-called first and second assessments are but the orders of the court, ordering the landowners to pay over to the commissioners a first or second estimate or installment of the benefits previously assessed. In our judgment counsel for plaintiff have correctly construed said Article 5. It requires a petition to be filed with the county court, signed by the landowners, praying for a judgment incorporation of the drainage company, and requiring certain things to be stated therein; among others, that notice shall be given to all owners of lands affected that commissioners should be appointed to view the premises and report to the court certain things, among others, the amount of the benefits the lands would receive and the amount of damages, if any, they would sustain in consequence of the proposed improvements, and the probable cost of

the improvements. That in pursuance thereof commissioners were appointed; that they viewed the premises and found and reported that there were 3,500 acres of land which could be reclaimed * * * Under this view of Article 5, not only was defendant in court all the time the proceedings were pending, but it is also true that all the benefits were assessed in the first instance, which was $25 to $30 upon each and every tract of land embraced within the district; and Section 8337 authorized the court upon the filing of the second report by the commissioners, that if the first installment of the assessment was not sufficient to complete the work, then to order a supplemental installment to be paid out of the benefits previously assessed against the property. In this manner, installment after installment might be ordered paid until all of the benefits assessed against the lands would be exhausted and paid by the landowners. The very object and purpose of the Legislature in having the maximum amount of benefits assessed in the first instance, and then providing that they should be paid on estimates or in installments, was for the benefit and protection of the landowner. In that manner no more tax would be collected than would be necessary to complete the work, while if the landowners had been required to pay all the benefits assessed in the first instance, then a sum of money far in excess of the requirements of the improvement would be paid over and collected by them. * * * We must therefore hold that defendant had his day in court, and having availed himself of the hearing there accorded him, he will not now be heard to say either in law or fact that the assessment complained of was invalid or deprived him of his property without due process of law, nor that his property was taken for public use without just compensation, for the record discloses that the benefits received by him by way of improvements are far in excess of the cost of the improvements."

The same question involved in this case came before the Supreme Court of Wisconsin in *Stone* v. *Little Yellow Drainage District* (95 N. W. 405). That court said:

> "The additional assessment of approximately $40,000 * * * is assailed on the further ground that the procedure taken, which is in accord with the statute, fails to constitute due process of law, in that no notice whatever is required by the statute, or was in fact given, of the application of the commissioners to make such assessment; resulting, as appellant claims, in the taking from him of his property by the collection of assessments, and, in advance thereof, by the imposition of a lien upon his land. The statutory provision is Section 1379-24, Rev. St. 1898, as amended by section 6, c. 43, p. 51, Laws of 1901, and is: 'If in the first assessment the commissioners shall have reported to the court a smaller sum than is needed to complete the work of construction or repair * * * a further assessment on the lands benefited, proportioned on the first, shall be made under the order of the court or the presiding judge thereof *without notice*.' We should have little doubt of the cogency of such an objection to a statute which originally authorized an imposition or assessment upon private property without any notice to him whatever, whether the result were to be accomplished by the judgment of a court, or by the decision of some legislative or executive tribunal. This second order, however, and the law authorizing it are not such. It is at most but one step in a general scheme of procedure, and must be considered in connection with the other parts. It has frequently been held that, even in tax proceedings out of court, notice of each step is by no means essential to due process of law, but that notice at any stage of the proceedings whereby the property owner has opportunity to be heard as to the apportion-

ment of a share of the burden to him is sufficient. *State* v. *Whittlesey*, 17 Wash. 447; 50 Pac. 119. * * * Even more obviously is it competent for the Legislature to dispense with notice of the various steps in a judicial proceeding after jurisdiction over a party has been acquired by due notice of its commencement. He may then be required to keep himself informed of all further steps or action within the limits of the jurisdiction so obtained. A still further and perhaps stronger reason controls the objection now made namely, that notice of this additional assessment could have availed plaintiff nothing. Every question upon which he had any right to be heard had already been concluded. The court, by its former order, had established the public purpose, the benefit to plaintiff's land, and the proportion. All that could be done by the commissioners or by the court in making this second assessment was mere arithmetical computation, for which the presence of a property owner was neither necessary nor useful. No error therein could prejudice him. *People* v. *Chapman*, 127 Ill. 387, 19 N. E. 872. For these reasons we conclude that it was competent for the Legislature to authorize this step without further notice and that the order of July 18, 1901, was also within the jurisdiction of the court, and, like its former orders, impregnable to collateral assault."

The legislature of the State of Iowa has determined the classification of all lands in the drainage district for the purpose of forming a basis of assessments levied to defray the cost of repairs in keeping the drainage improvement efficient. By the same section of the statute it has determined the ratio of assessment. This identical question has very frequently come before this court. In 1915, in *Wagner* v. *Leser* (239 U. S. 207, 36 S. C. Rep. 66), this court said:

"It is further urged, and much stress seems to be laid upon this point, that the complainant and others similarly situated were given no opportunity to be heard as to the amount of benefits conferred upon them, and the proper adjustment of the taxes among property owners. But this question, like the other, is foreclosed by the former decisions of this court. *This assessment, and the classification of the property to be improved, were fixed and designated by legislative act.* It was declared that the property which had been improved by paving theretofore should, according to the width of the paving in front of the respective properties, be assessed at a certain sum per foot front. We think such a tax, when levied by the Legislature, did not require notice and a hearing as to the amount and extent of benefits conferred in order to render the legislative action due process of law within the meaning of the Federal Constitution."

In *Spencer* v. *Merchant* (125 U. S. 345, 8 S. C. Rep. 921), this court, speaking through Mr. Justice Gray, said:

"In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the Legislature of the state, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners."

We urge upon the consideration of the court our contention that the question raised by the plaintiffs in error in this cause that they were entitled to a notice and hearing before the Board of Supervisors of Pocahontas County to levy the additional assessment, is foreclosed by the decisions of this court. By an act of the Legislature the Board of Supervisors received the delegated power merely to perform mathematical calculations, ascertain the cost of the repair and the improvement of the drainage system. With this amount ascertained, the Board was vested merely with clerical power to compute the amount of the tax upon each forty-acre tract of land in the drainage district upon the basis of ratio fixed by the original classification and assessment. No relief could be granted to the plaintiffs in error by the Board of Supervisors if the plaintiffs in error did appear before the Board at the time of the last assessment and object thereto, because they were foreclosed by an act of the Legislature from taking or seeking any step to decrease their assessments.

We quote further from the case of *Wagner* v. *Leser*, *supra*:

> "This case has been followed and approved in subsequent decisions in this court. *Parsons* v. *District of Columbia*, 170 U. S. 45, 50, 56, 52 L. Ed. 943, 945, 947, 18 S. C. Rep. 521; *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 343, 45 L. Ed. 879, 889, 21 S. C. Rep. 625. In the latter case, the former cases in this court were reviewed at length, and *Spencer* v. *Merchant*, quoted with approval; *Norwood* v. *Baker*, 172 U. S. 269, 43 L. Ed. 443, 19 S. C. Rep. k87, was commented upon and dis-

tinguished. *French* v. *Barber Asphalt Paving Co., supra,* was followed and approved in a series of cases in the same volume; *Wight* v. *Davidson,* 181 U. S. 371, 45 L. Ed. 900, 21 S. C. Rep. 616; *Tonawanda* v. *Lyon,* 181 U. S. 389, 45 L. Ed. 908, 21 S. C. Rep. 609; *Webster* v. *Fargo,* 181 U. S. 394, 45 L. Ed. 912, 21 S. C. Rep. 623; *Cass Farm Co.* v. *Detroit,* 181 U. S. 396, 45 L. Ed. 914, 21 S. C. Rep. 644; *Detroit* v. *Parker,* 181 U. S. 399, 45 L. Ed. 917, 21 S. C. Rep. 624; *Wormley* v. *District of Columbia,* 181 U. S. 402, 45 L. Ed. 921, 21 S. C. Rep. 609; *Shumate* v. *Heman,* 181 U. S. 402, 45 L. Ed. 922, 21 S. C. Rep. 645; *Farrell* v. *West Chicago Park,* 181 U. S. 404, 45 L. Ed. 924, 21 S. C. Rep. 609; *French* v. *Barber Asphalt Paving Co., supra,* was referred to with approval in *Hibben* v. *Smith,* 191 U. S. 310, 326, 48 L. Ed. 195, 201, 24 S. C. Rep. 88. See also *Louisville & N. R. Co.* v. *Barber Asphalt Paving Co.,* 197 U. S. 430, 49 L. Ed. 819, 25 S. C. Rep. 466; *Martin* v. *District of Columbia,* 205 U. S. 135, 51 L. Ed. 743, 27 S. C. Rep. 440.

Norwood v. *Baker, supra,* is much relied upon by the plaintiff in error, and while this court has shown no disposition to overrule that case when limited to the decision actually made by the court, much that is said in it must be read in connection with the subsequent cases in this court already referred to. In *Norwood* v. *Baker,* a portion of a person's property, located in a village of Ohio, was condemned for street purposes, and the entire cost of opening the street, including the amount paid for the strip condemned, with the costs and expenses of condemnation, was assessed upon the abutting property owner whose land was condemned. This, it was said in *French* v. *Barber Asphalt Paving Co., supra,* was an abuse of the law and an act of confiscation, and not a valid exercise of the taxing power. Taking the decisions in this

court together, we think that it results that the legislature of a state may determine the amount to be assessed for a given improvement, and designate the lands and property benefited thereby, upon which the assessment is to be made, without first giving an opportunity to the owners of the property to be assessed to be heard upon the amount of the assessment or the extent of the benefit conferred.

We do not understand this to mean that there may not be cases of such flagrant abuse of legislative power as would warrant the intervention of a court of equity to protect the constitutional rights of landowners, because of arbitrary and wholly unwarranted legislative action. The constitutional protection against deprivation of property without due process of law would certainly be available to persons arbitrarily deprived of their private rights by such state action, whether under the guise of legislative authority or otherwise. But in the present case there is neither allegation nor proof of such disproportion between the assessment made and the benefit conferred as to suggest that the small tax levied upon this property would amount to an arbitrary exercise of the legislative power upon the subject. There can be no question that paving with brick in front of the property of the complainant conferred a substantial benefit, and gave authority for the subsequent legislation which, because of that benefit, original and continuing, warranted an assessment upon the property owner for a confessedly public purpose—the improvement of the streets of the city.

We are unable to find that the act of the legislature in question, or the manner of its present enforcement, operates to deprive the complainant and others similarly situated of any rights secured to them by the Federal Constitution. The judgment of the Court of Appeals of Maryland is affirmed."

We quote from *French* v. *Barber Asphalt Paving Company* (181 U. S. 324, 21 S. C. Rep. 631), as follows:

> "Assuming for the purpose of this objection, that the owner of these lands had by the provisions of the act, and before the lands were finally included in the district, an opportunity to be heard before a proper tribunal upon the question of benefits, we are of the opinion that the decisions of such a tribunal, in the absence of actual fraud and bad faith, would be, so far as this court is concerned, conclusive upon that question. It cannot be that upon a question of fact of such a nature this court has the power to review the decision of the state tribunal which has been pronounced under a statute providing for the hearing upon notice. The erroneous decision of such a question of fact violates no constitutional provision."

The Iowa drainage law provides for hearing for the Plaintiffs in Error before their lands were finally classified and before their lands were included in the drainage district, and before the original assessment was levied upon these lands for the cost of the original improvement.

Second Dillon, Municipal Corporations, section 752, fourth edition, is as follows:

> "The Courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. Whether the expense of making such improvement shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the

latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency."

Re-Assessment.

A re-assessment of property for the benefit of a public improvement may be made where the original assessment has been insufficient, or illegal, or where property subject to the assessment has been omitted. Furthermore, re-assessments may be made without violation of the guarantee of due process for the maintenance and repair of public improvements. If the owner has, by reason of notice or otherwise, been properly made a party to the proceeding, no additional notice of the re-assessment need be given him, and where the provision for notice is that there shall be three successive publications in the official newspaper of the city and objections may be filed within ten days after the last publication the time is not so short as to amount to a denial of due process of law. The validity of a re-assessment is governed by the law in force at the time it is made and it may therefore be valid, although it is not made in the manner prescribed by law at the time of the original assessment, although the property on which it is made was exempt from further assessment under the law in force when the original assessment was levied.

Corpus Juris Sestion 1067 p. 1265.

Under the Minnesota drainage statute the Legislature delegated the authority to levy additional assessments for the cost of maintaining the ditch in good condition and to defray the expense of repairs thereon. The statute did not provide for any notice of such assessments. Passing upon the constitutionality of this statute the Supreme Court of Minnesota, In re McRae, et al. (100 N. W. 384) said:

> "The constitutionality of said act is challenged * * * in this: that after providing for an assessment against all property benefited to the full extent of benefits received from the construction of such ditch, the Legislature, by section 25 of said chapter, attempted to place a further burden thereon by authorizing an additional assessment from time to time to cover the expense of maintaining and keeping such ditch in repair. We are of the opinion this additional burden may be deemed a necessary incident to the construction of the ditch. The power to specially assess is coextensive with the benefits received. It is a continuing one and may be exercised to cover the expense of maintaining such an improvement. All owners having been given an opportunity to question both the validity and amount of such assessment, not only before the board of county commissioners, but also in the court below upon appeal, or personal appearance, the authority to make an equitable assessment on the basis specifically provided by said act in our opinion does not authorize the taking of property without the due process of law, and is not in violation of the provisions of the state or Federal Constitution. (Citing authorities) We adhere to the proposition that the Legislature intended to provide exclusively for the public welfare, and that the act is valid, and does not authorize the taking of private property for

other than a public purpose, or the prosecution of any proceeding in such a manner as to deprive a person of his property except by due process of law."

The exact and specific question presented to this court by the Plaintiffs in Error was also presented to this court in *Carson* v. *Sewer Commissioners of Brockton* (182 U. S. 398, 21 S. C. Rep. 860, 45 L. Ed. 1151). The opinion is by Mr. Justice Brown. In this last cited case an ordinance provided for additional assessments for the maintenance of a sewer system. The ordinance did not require notice and none was given of the additional assessment. Your Honors said:

> "The validity of the legislative act is assailed upon the ground that no notice was required to be given to the property owner nor provision made for a hearing, and that the authority given to the city council of Brockton to change the rate of sewerage charges and assessments from time to time manifested an intention on the part of the Legislature to assess such property without regard to benefits. There is no doubt that, when land is proposed to be taken and devoted to the public service, or any serious burden is laid upon it, the owner of the land must be given an opportunity to be heard with respect to the necessity of the taking and the compensation to be paid by the city. * * * The stress of petitioner's argument appears to be laid upon the proposition that his property having been once assessed for the construction of the common sewer, he has a right to the free use of such sewer forever afterwards, and that the expense of its maintenance must be raised by general taxation, and not by special assessment. This, however, is a question of state policy. It was for the Legislature to say whether the con-

struction of the sewer entitled the adjoining property owners to the free use of it, or only to the right to a free entrance to it of their particular sewers. As held by the Supreme Judicial Court, there can be no doubt that the adjoining property owners did receive special benefit in being permitted to discharge their private sewers into it. The amount of such benefit was, under the statutes of the commonwealth, determinable by the city council, which fixed upon a certain rate for unmetered service and a certain other rate per one thousand gallons of sewage discharged for metered service. We have held in the recent case of *Parsons* .v. *District of Columbia.* * * * that it was competent for the legislative power to assess the amount of benefit specially received by abutting property, and so long as such amount is not grossly excessive, or out of all proportion to the benefit received, there is no reason to complain, particularly if, as held by the Supreme Judicial Court in this case, the question of connecting with the public sewer be left optional with the property owner. * * * No one denies that it was a special benefit to the petitioner to have a sewer built in front of his land. That benefit was the probability that the sewer would be available for use in the future. But the city, by building it and receiving a part of the cost from the petitioner, did not impliedly bind itself or the general taxes that the sewer should be maintained forever, and that the petitioner should be at liberty to use it free of further expense. If building the sewer was a special benefit, keeping the sewer in condition for use by such further expenditure as was necessary was a further special benefit to such as used it."

Conclusion.

We submit that the fact question is controlling in this case, and that the constitutional question is not in-

volved other than as a moot issue; and we further submit that the findings of the Supreme Court of Iowa are correct and should be affirmed on the fact question, which disposes of this appeal; and we further submit that the dictum as contained in the opinion handed down by the Supreme Court of Iowa in relation to the constitutional question, which, although not involved in this appeal, was referred to in the opinion handed down by the Supreme Court of Iowa as a moot question, was legally correct, and, that, as a matter of law, even though the fact question were not controlling in this appeal, the Iowa statute in relation to the assessment for repairs is constitutional and not in violation of the due process of law clause, and that it is merely a legislative issue, in that no notice of a tax of this nature is a constitutional requisite.

We respectfully ask that this appeal be dismissed and the findings of the Supreme Court of Iowa be affirmed.

Robert Healy

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Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 23.—October Term, 1921.

William Breiholz, Edward Korf, Joseph Stuart, et al., Plaintiffs in Error, *vs.* The Board of Supervisors of Pocahontas County, Iowa, et al.	In Error to the Supreme Court of the State of Iowa.

[November 7, 1921.]

Mr. Justice Clarke delivered the opinion of the Court.

Conformably to the statutes of the State, Drainage District No. 29 was organized in Pocahontas County, Iowa, in 1907, and a system of drainage, regularly planned, adopted and constructed, was completed in 1909. An assessment to pay for this improvement was imposed upon the lands within the District in proportion to the benefits which each tract would derive from it.

Two years later, in 1911, parts of the ditches having become so filled up as to impair the usefulness of the system, the County Board of Supervisors adopted a resolution declaring that it was expedient that the drainage improvement should be "re-opened, cleaned and otherwise repaired" for the better service of the land tributary to it, and to that end a contract was let to "deepen, clean, re-open and repair" the ditches in the parts and in a manner specified. An assessment to pay for this re-opening, cleaning and repairing was made upon the lands in the District in the same proportion to benefits as that made to pay for the original construction, and the controversy in this case is as to the constitutionality of the statute under which this assessment was levied upon the lands of the plaintiffs in error.

The state statutes (Supplement to the Code of Iowa, 1913, Ch. 2-A) committed to the Board of Supervisors of the County, the power to establish drainage districts, to adopt systems of drainage, to determine the extent of any damage which might be caused to lands thereby, and to make assessment on the lands in the District, in proportion to benefits, to pay for the improvement.

Elaborate provision is made for notice to all owners of land within a proposed drainage district, of the application for the establishment of it, of the time for hearing claims for damages likely to be caused by the construction of the drainage system, and of the time when objections may be made to the assessment in proportion to benefits. From the determination of the Board with respect to each of these a right of appeal to the state District Court is given.

It is admitted that all of the requisite action was taken to establish the system of drainage involved and for making the assessment upon the benefited lands, including those of the plaintiffs in error, to pay for the original work done, and that sufficient notice thereof to satisfy all constitutional requirements was given to all concerned.

The action in this case was taken under section 1989-a21 of the Iowa Code (Supplement, 1913) which provides that after any drainage district shall have been established and the improvement constructed (as in this case):

" . . . the same shall at all times be under the control and supervision of the board of supervisors, and it shall be the duty of the board to keep the same in repair and for that purpose they may cause the same to be enlarged, reopened, deepened, widened, straightened or lengthened for a better outlet." . . . "The cost of such repairs or change shall be paid by the board from the drainage fund of said . . . drainage district, or by assessing and levying the cost of such change or repair upon the lands in the same proportion that the original expenses and cost of construction were levied and assessed, except where additional right of way is required or additional lands affected thereby, in either of which cases the board shall proceed" giving notice and hearing as is otherwise provided.

It will be noted that the section thus quoted does not require that notice shall be given to landowners of such intended enlarging, re-opening, etc., of the drainage system as is provided for therein, and that no provision is made for a hearing with respect thereto, at which objections may be made either to the doing of the work or to the assessment to pay for it, and the contention of the plaintiffs in error is that the failure to provide for such notice and hearing renders the section unconstitutional for the reason that if enforced it would deprive them of their property without due process of law.

To this contention of invalidity it is replied that the section assailed is a legislative determination of the amount which should be assessed upon the lands of plaintiffs in error to pay for the preservation and repair of the drainage system, and that, therefore, due process of law did not require a new notice and opportunity to be heard before the work was determined upon or the assessment made,—this under authority of decisions of this Court, extending from *Spencer* v. *Merchant*, 125 U. S. 345, to *Branson* v. *Bush*, 251 U. S. 182, 189.

The Supreme Court of Iowa held the statute and assessment both valid, and a writ of error brings the case here for review.

The contention that a new notice and hearing was not required in this case by the due process provision of the Fourteenth Amendment is a sound one. We are dealing with the taxing power of the State of Iowa, exerted through the familiar agency of a regularly organized drainage district, which it is admitted, properly included, and by the system of drainage adopted benefited, the lands of the plaintiffs in error. It is admitted also that their lands were lawfully assessed to pay for the original drainage construction in the same proportion to benefits as that which was applied in this case to the cost of the improvements and repairs. Thus *Myles Salt Company* v. *Board of Commissioners*, 239 U. S. 478, and *Gast Realty & Investment Company* v. *Schneider Granite Company*, 240 U. S. 55, which are much relied upon, are plainly inapplicable.

The provision of the section assailed, that the cost of repairs shall be assessed upon the lands of the District in the same proportion that the original cost was assessed, since it only requires a simple calculation to determine the amount of each assessment when the cost of the improvement is once determined, is a legislative declaration that the lands will be benefited, and that in such case notice and hearing before such a legislative determination is not necessary, is settled by many decisions of this Court, among others, *Hagar* v. *Reclamation District*, 111 U. S. 701, 708; *Spencer* v. *Merchant*, 125 U. S. 345; *Embree* v. *Kansas City*, 240 U. S. 242, 250; *Wagner* v. *Leser*, 239 U. S. 207, 217, 218; *Houck* v. *Little River District*, 239 U. S. 254, 265, and *Branson* v. *Bush*, 251 U. S. 182, 189.

The only possible source of objection remaining is the committing to the Board of Supervisors the power to determine, without notice

and hearing, when repairs are necessary and the extent of them. But these are details of State administration with which the Federal authority will not interfere, except, possibly, to prevent confiscation or spoliation of which there is no suggestion in this case. *Davidson* v. *New Orleans*, 96 U. S. 97, 106, and cases cited, *supra*.

The propriety of resorting to such a practice—process of law applicable to such a case—is commended to us by the comment of the Supreme Court of Iowa, in deciding this case, saying:

"The duty [to keep the drainage system open and in repair] is one which is continuous, calling for supervision from day to day, and month to month, or in the language of the statute 'at all times.' The work to be done may involve considerable expense or it may be a succession of petty repairs, each of which is comparatively inexpensive. To require that in each case the board must advertise and seek the lowest bidder [and hold hearings with respect to it] would be to hamper and prevent its action without corresponding benefit to the public."

It is not necessary that we should consider whether a case can be imagined in which the ditches of a district might be enlarged, deepened, widened and lengthened to an extent such as to constitute a new construction and a new taking of property, which would require a further notice and hearing before a new assessment for it could be constitutionally imposed, for we have no such case here. There was some widening of the ditches for the purpose of securing a better angle of repose for the sides and some slight widening and deepening of the bottom at various points for the purpose of getting a better fall and outlet for the water, but we quite agree with the two state courts that the changes made were of a character and extent fairly within the scope of a cleaning, alteration and repair of the ditch system and necessary to promote its usefulness.

While the principles of law applicable to this proceeding are well settled we have preferred to again refer thus briefly to the controlling cases rather than to dismiss the petition in error.

It results that the motion to dismiss will be overruled and the judgment of the Supreme Court of Iowa

Affirmed.

Mr. Justice McReynolds concurs in result.